TOPICAL INDEX.

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3-16	STATEMENT OF FACTS.
3,4	Amendment of August 18, 1922.
	Requires Commission to order interchangeable tickets at "just and reasonable rates" good over all lines.
4,5	Commission ordered 2500 miles, standard fare $90, to be sold for $72—2.88 cents per mile.
5	Amendment passed by Congress at behest of the organized Commercial Travelers.
5,6	Mileage ticket sold at discount is a discrimination which long escaped prohibition, but was abolished in 1918.
5,7	Congress has consistently prohibited discriminations in passenger fares, with limited exceptions.
8	The "just and reasonable" standard fare is fixed by the Commission at 3.6 cents.
8	Fixed in 1920 under section 15*a* of Transportation Act of 1920.
8,9	Not reduced in 1922.
9	Recent rulings on fares—footnote.
9	3.6 held necessary to produce rate of fair return.
10	Rate of fair return not yet achieved,
11	although, excluding commutation travel, the 3.6 rate has been approximately realized, in spite of tourist and excursion rates.
11	81% of travel, excluding only commutation, and including tourist and excursion, pays 3.481.
11	Enforcement of the order would cause estimated loss of $32,000,000 a year.
	See also p. 62.
12	Operating expense is 85.24%, which, applied to the average fare, excluding commutation, is 2.97.
	See also pp. 50, 51.
12	This ticket rate is less than the operating expense (based on average fare, excluding commutation) by .09 of a cent.
12	Fallacy in Commercial Travelers' computations.
13,14	Additional expense attending this ticket.

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13, 15 25% increased travel under this ticket would be required to make up loss in revenue—one billion additional passenger miles.
See also pp. 70, 71.

15 Whether this ticket will stimulate travel the Commission finds pure speculation.

15 Wholesale principle does not apply, the Commission finds.

16 The order is described by the Commission as an experiment.

16 Exemptions by the Commission.

16-121 ARGUMENT.

I.

16 THE COMMISSION WRONGLY CONSTRUED THE AMENDMENT EITHER AS REQUIRING REDUCTION OR AS BETRAYING AN UNEXPRESSED INTENTION OF CONGRESS THAT THE RATE BE REDUCED. SO THE DISTRICT COURT HELD.

17-19 Quotations from Commission's Report, showing that the majority were trying to adopt what they thought was the "spirit" and "apparent theory" of the Amendment,

20 instead of determining the just and reasonable rate upon the evidence and their findings—

20, 21 showing also that the conclusion that "the rates resulting from that reduction will be just and reasonable for this class of travel" is contrary to the evidence and the findings of fact,

22 and is based upon a guess by the majority that after sufficient experiment it may appear that enough new travel will develop to justify them.
See also pp. 36-38, Summary of Commission's findings.

22 Commission's brief admits that Commission understood that Congress wanted a lower rate.

23 The majority wrongly sought instruction from the debates of Congress to depart from the plain meaning.

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23 They mistook the real intent of Congress, shown by finally eliminating from the Amendment the provisions for reduction and substituting "just and reasonable rates."

Appendix A (123-138) sets out the 14 bills, all prescribing reductions of 20% to 33 1/3% of the regular fare.

Appendix B (139-157) gives the history of the Amendment (139-140) and quotes extracts from the Debates (140-157).

24, 26 Congress knew that the just and reasonable rate was confirmed at 3.6 while the debates were going on.

25 "Just and Reasonable Rates" have the same meaning in the Amendment as in the other portions of the Act which prohibit discrimination and require adequacy.

26, 27 Congress intended to maintain the rate already established until the Commission should have evidence to change it.

27, 28 Congress did not intend such discrimination.

29 If it had prescribed reduction, it would not have authorized the Commission to make the ticket transferable.

29-34 History of section 22, of which this Act is an Amendment.

See Appendix E, p. 191.

The section is to be read in connection with the rest of the Act, preserving the right of the carriers to grant certain preferences, but not

30 conferring upon the Commission power to require them.

30, 31 *Nashville, C. & St. L. Ry.* v. *Tenn.*, 262 U.S. 318.

See Appendices C (158-175) and D (176-180) for I.C.C. decisions and Conference Rulings referred to in *Tennessee* case.

32 Commutation rates already established are a class apart.

33 *Penn. R.R.* v. *Towers*, 245 U.S. 6.

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II.

34-61 THE ORDER IS VOID, BECAUSE SUPPORTED BY NO SUBSTANTIAL EVIDENCE, BECAUSE ARBITRARY, AND BEYOND THE COMMISSION'S AUTHORITY.

35-40 *A. No evidence upon which to base a finding that the reduction will appreciably increase revenue.*

See Subject Index of Evidence, Appendix F (195, 196).

36-38, 40 Commission expressly declined to make such a finding.

39 A general reduction would increase travel more, but is not found to be "just and reasonable."

41 Optimistic guesses of commercial travelers not treated by the Commission as evidence upon which to base such a finding.

42 (They are not even a "scintilla of proof.")

42 Decisions holding that an order must be supported by substantial evidence. It must be an "adjudication," not a "fiat."

43 *B. The Order confesses itself to be an experiment.*

43, 44 An experiment based on existing conditions, plus judgment, may be permissible—not when based solely on conjecture.

45 *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, etc., distinguished.

46-47 *C. This experiment will not produce evidence as to how many miles will be traveled at 2.88 which would not have been traveled at 3.6 (standard fare) or 3.481 (average fare, excluding commutation).*

47-49 *D. This experiment would impose $1,680,000 per year in extra clerical expense—an additional indication of the unreasonableness of the order at the reduced rate.*

49-52 *E. The experiment would fix non-compensatory rates.*

50 It would increase the operating ratio on the same amount of travel to 107.25%.

51 Disregarding the burden of clerical expense and taxes, it would cost 2.97 to produce a revenue of 2.88.

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51 Fallacy of Commercial Travelers' argument that 2.88 is higher than average fare.
52 *No. Pac. R.R.* v. *No. Dakota*, 236 U.S. 585, considered.
52, 53 *F. The experiment discriminates between carriers without evidence of "particular circumstances shown to the Commission" justifying exemption.* See also pp. 119-121.
53-57 *G. The order arbitrarily gives to numerous carriers the right to determine for themselves whether they shall come under the order.*
55 Chairman Winslow's report to Congress.
57 It discriminates against the carriers which are not exempted.
58-61 *H. The order is not limited to interstate commerce, but includes journeys within a state.*
58 There is no ambiguity justifying construction to save it.
59 The House struck out the word "interstate," and the Commission's order applies to "all passenger trains operated by the respondents."
60 *Railroad Commission of Wis.* v. *C., B. & Q. R.R.*, 257 U.S. 563, distinguished.

III.

61-65 THE ORDER IS VOID BECAUSE IT DISREGARDED AND VIOLATED SECTION 15*a*.
62 The Commission under 15*a* fixed the fair rate of return at 5.75% on the valuation. The Eastern group were earning only 3.78%. This experimental order would cut off 6% of their passenger revenue from the same amount of travel.
63 Yet section 15*a* requires the Commission to fix rates which will produce this fair return.
64 Section 22 must be administered consistently with section 15*a*.
65 The order cannot be supported under the "reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable."

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IV.

65-76 THE COMMISSION WRONGLY CONSTRUED THE AMENDMENT AS REQUIRING "AN ADDITIONAL CLASS OF PASSENGER TRAVEL" TO BE RECOGNIZED.

65 Some of the bills in Congress filed in behalf of the Commercial Travelers treated them as a preferred class. Such preference was rejected by Congress.

66 Classifications which are proper because related to cost of service—commutation, convention, excursion, and tourist fares.

66-69 Such special fares distinguished from interchangeable mileage or scrip-coupon tickets. Opinion of Commissioner Daniels.

70 Commutation service is treated as a distinct branch.

70, 71 No proper basis for classifying coupon-ticket buyers separately.

71, 72 If classed separately at 20% reduction in fare, 10,000,000 persons must each take two additional journeys of 50 miles (the average journey) in order to make up the difference in fare without adding anything even for the cost of carrying them.

72 Such extra travel is found by the Commission to be "in the realm of speculation."

72, 73 Some considerations suggested by Commercial Travelers' brief.

73 Commercial travelers, if they increase their travel by an average of one man per car, will not economically be absorbed into unfilled cars, but will expensively congest the commercial routes.

73-74 The possession of $72 to spend in advance and a business motive for traveling 2500 miles do not justify classification at a lower rate. No analogy to the carload lot.

75, 76 No analogy to the present interchangeable transferable scrip-coupon ticket sold at full rate.

76 Reduced cost would be the only justification for reduced rates.

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V.

76-119 THE ORDER IS AN ARBITRARY AND UNREASONABLE DISCRIMINATION BETWEEN SCRIP-COUPON PASSENGERS AND REGULAR-FARE PASSENGERS, BEYOND THE POWER OF THE COMMISSION, AND LACKING DUE PROCESS OF LAW.

77, 78 Though the Amendment, properly construed, is in this respect valid, the Commission has proposed to administer it in an arbitrary and discriminating manner.

78 Both the general public and the carriers are hurt by the discrimination,

79 which has no reasonable relation to the conditions of travel.

80-85 *I.C.C.* v. *B. & O. R.R.*, 145 U.S. 263, considered.

84 The basis of the discrimination is not the service rendered, but the capacity of the traveler to buy.

85 Discussion of authorities condemning the principle of the wholesale ticket at a lower rate.

86-93 *Lake Shore & Mich. Southern Ry.* v. *Smith*, 173 U.S. 684.

93-99 Other cases illustrating the same point.

99-105 *No. Pac. Ry.* v. *No. Dakota*, 236 U.S. 585.

106-110 Arbitrariness condemned.

108 *Interstate Ry. Co.* v. *Mass.*, 207 U.S. 79.

110 Dictum of Holmes, J., against favoring "people who could afford to buy 1000-mile tickets."

110-112 *Penn. R.R. Co.* v. *Towers*, 245 U.S. 6.

113-116 *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134.

116-119 The *Smith* case, in the light of more recent authorities, now stands for this proposition. The Commission, having prescribed a standard fare for the general public, may adopt classifications which are proper and fix classified rates which are suitable. But it may not create arbitrary classifications and apply arbitrary rates to them. If it does, the carriers as well as the individuals injured may complain.

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VI.

119-121 THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE COMMISSION WITHOUT FIXING ANY STANDARD TO GUIDE ITS ACTION.

119-121 The Commission would have been equally within its power under the terms of the Amendment if it had exempted half of the Class 1 railroads and applied its order to the other half.

123-138 *Appendix A.*
The bills providing for interchangeable tickets at reduced rates, which resulted in the Amendment.

139-157 *Appendix B.*

139-140 Legislative history of the Amendment—in brief.

141-145 Remarks by Senator Cummins relating to the final form of the bill, requiring the Commission to find "just and reasonable rates."

145-148 Letter from Commission to Senator Cummins—disapproval of reductions based on "wholesale" theory.

150-152 Remarks by Rep. Huddleston—The only evidence showed that these tickets produced no economy and could not be sold at a discount. The Amendment will require increased rates. Congress ought not to give a stone to commercial travelers asking bread.

152-153 Rep. Winslow—The Senate never intended to express an opinion on the price.

153-154 Rep. Hawes—Travelers' Association understands that the Commission may raise the rates.

154-155 Rep. Newton—in excuse for striking out the word "interstate." A mileage book good only for interstate travel would be of little benefit to the commercial traveler.

155-157 Sen. Pomerene—against striking out "interstate." The Amendment cannot be applied to intrastate travel, which is 60% of the travel. Striking out the word makes the Amendment unconstitutional.

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158-175 *Appendix C.*
Quotations from I.C.C. decisions cited in *Nashville, C. & St. L. R.R.* v. *Tennessee*, 262 U.S. 318, 324, illustrating the difference between voluntary action and legal compulsion.

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163 *Field* v. *So. Ry.*, 13 I.C.R. 298.
164 *Metropolitan Paving Brick Co.* v. *Ann Arbor R.R. Co.*, 17 I.C.R. 197.
165 *Eschner* v. *P. R.R. Co.*, 18 I.C.R. 60.
166 *Dairymen's Supply Co.* v. *P. R.R. Co.*, 28 I.C.R. 406.
167 *United States* v. *U.P. R.R. Co.*, 28 I.C.R. 518.
168 *Havens* v. *C. & N.W. R.R. Co.*, 20 I.C.R. 156.
170 *Cator* v. *S.P. Co. & U.P. R.R. Co.*, 6 I.C.R. 113.
172 *Commutation Rate Case*, 21 I.C.R. 428.
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176-180 *Appendix D.*
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181-194 *Appendix E.*
Text of the sections of the Commerce Act referred to in the Brief.

181 Sec. 1 (4).
181, 182 Sec. 1 (5).
182-184 Sec. 1 (7).
184 Sec. 2.
184, 185 Sec. 3 (1).
185 Sec. 3 (3).
185 Sec. 6 (7).
186 Sec. 8.
186, 187 Sec. 10 (1).
187, 188 Sec. 13 (1).
188-190 Sec. 15 (1).
190 Sec. 15*a* (2).
190, 191 Sec. 15*a* (3).
191-193 Sec. 22 (1).
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193, 194 Sec. 22 (3).

195, 196 *Appendix F.*
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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA ET AL.
v.
THE NEW YORK CENTRAL RAILROAD COMPANY ET AL.

BRIEF FOR APPELLEES.

Scope of This Brief.

This suit was brought before the District Court of the United States for the District of Massachusetts under the provisions of the Urgent Deficiency Appropriation Act of October 22, 1913 (38 Stat. L. 219), to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered March 6, 1923. By this order the Commission required all Class 1 railroads in the United States to issue interchangeable scrip-coupon tickets in denominations of $90, at a reduction of 20% from the face value thereof.

The entire record before the Commission, together with certain affidavits submitted by the carriers and by counsel for the traveling salesmen, was introduced before the District Court. It was agreed that the cause should be deemed submitted for final hearing. After extended oral

arguments by all parties the District Court granted the petition and issued a permanent injunction against the enforcement of the order.

The United States, the Interstate Commerce Commission, and certain individuals and organizations representing commercial travelers appealed from this decree. Certain other organizations of commercial travelers, not parties to the proceedings before the District Court, have appeared and filed briefs as *amici curiae*.

The District Court granted the petition and enjoined the enforcement of the order on the ground that it was made by the Commission under a misapprehension of the meaning of the Act of Congress and without proper findings or an adequate record as a basis for its action. The petitioners had urged not only this ground, but several others, in opposition to the validity of the order. The court did not pass upon any of the other grounds except that it went out of its way to express its disagreement with one contention of the petitioners regarding the constitutionality of the statute.

Believing that the court was right in enjoining enforcement of the order on the ground upon which it based its action, and believing also that the order is invalid for several other reasons, as urged by them before the District Court, the appellees will discuss in this brief several reasons why, as they contend, the injunction should stand. Briefly summarized, their contentions are as follows: (1) the District Court was correct in holding that the Commission erred in its interpretation of the statute as requiring a reduction in fare; (2) the order is void because the Com-

mission's findings show that there was no substantial evidence to support it, it was admittedly experimental and the experiment cannot produce any better evidence than was available when the order was made; (3) the order is void because it imposes unreasonable burdens upon the railroads, prescribes rates which are noncompensatory, creates an unjustifiable discrimination between railroads, and applies to intrastate commerce; (4) the order is void because the Commission therein delegated legislative powers to certain railroads; (5) the order is void because it violates the provisions of section 15*a* of the Interstate Commerce Act; (6) the Commission erred in construing the statute as requiring the recognition of an additional class of passenger travel; (7) the order is void under the Fifth Amendment to the Constitution because it creates arbitrary and unreasonable discrimination between passengers who have the desire and the money to buy 2500 miles of transportation in advance and those who have not; (8) the statute is unconstitutional because it delegates legislative power to the Commission without fixing any standard to guide the Commission's action.

Statement of Facts.

The order in suit purported to be made pursuant to paragraph 2 of the Act of Congress approved August 18, 1922 (42 Stat. L. 827), amending section 22 of the Act to Regulate Commerce. Paragraph 2 reads as follows:

> "(2) The commission is directed to require, after notice and hearing, each carrier

by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled."

The Commission interpreted this amendment as a mandate from Congress to require carriers to sell such interchangeable tickets at a rate less than the standard fare, and, basing their order upon such interpretation, issued their order requiring such tickets to be sold at a discount of 20%.

The amendment under which the Commission purported to act appears from the record to have been passed at the behest of and for the

benefit of commercial travelers, representing a large number of business houses and whose organization in numbers and influence the Commission appeared to think was strong enough to obtain such discrimination in their favor. The record as made by the Commission does not disclose that such persons are needy or are engaged in any charitable or educational pursuits or constitute any special class of traffic such as commutation, excursion, or convention travelers, but comprise persons who are possessed of a substantial amount of money, who travel for business organizations amply able to pay the standard fare, and who under the privileges of the proposed ticket would enjoy all the accommodations for person and property afforded by all passenger-carrying trains on all Class 1 railroads, while the privilege of traveling at the reduced rate would be denied to all persons who are unable to afford the sum of $72 in contemplation of travel within the year amounting to 2500 miles.

The history of the mileage ticket as described by the record before the Commission clearly shows that it had its origin in a desire and attempt of carriers to make discriminations and grant advantages and concessions to shippers of freight at a time when discrimination and concession was common (Record, pp. 23, 118-121). From time to time since the passage of the original Commerce Act in 1887 Congress has by repeated enactments and the most emphatic language prohibited, with severe penalties, granting discriminatory passenger rates under any terms or circumstances to any persons whatsoever. The only exceptions to these prohibitions have been

limited to persons specifically defined by Congress, namely, to ministers of religion, to municipal governments for the transportation of indigent persons, and to inmates of national homes for soldiers and sailors (see Transportation Act, sec. 22, 25 Stat. L. 855). The enactments of Congress directed to absolutely prevent abuses of discrimination between persons, which had long been the subject of complaint, are aimed at every conceivable form which such discrimination has been or may be found to take. (Appendix E hereof sets forth at length the sections of the statute which are discussed in this brief.)

By section 1, paragraph 4, of the Commerce Act as amended (41 Stat. L. 474) it is the duty of every carrier to establish just and reasonable fares. By paragraph 5 every unjust and unreasonable charge is prohibited and declared unlawful. By paragraph 7 free transportation is prohibited except in specified instances. By section 2 (41 Stat. L. 479), as amended February 28, 1920, any carrier who directly or indirectly by any special rate, rebate, drawback, or other device charges, demands, collects, or receives from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service under substantially similar circumstances and conditions shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

By section 3 (41 Stat. L. 479) as amended February 28, 1920, it is unlawful for any carrier

to make or give any undue or unreasonable preference or advantage to any person or any particular description of traffic in any respect or to subject any person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By section 3, paragraph 3, carriers are prohibited from discriminating in fares and charges between connecting lines.

By section 6, paragraph 7 (34 Stat. L. 584), it is provided that no carrier shall refund or remit in any manner or by any device any portion of the fares charged or extend to any person any privileges or facilities except such as are specified in its tariffs filed with the Commission.

By section 8 (24 Stat. L. 379) carriers are made subject to liability for the full amount of damages sustained in consequence of any violation of the foregoing provisions, together with reasonable attorney's fees to be taxed as part of the costs.

By section 10 (41 Stat. L. 483) any common carrier and any director or officer or agent of such carrier who violates any of the foregoing provisions is subject to a fine of not exceeding $5000 for each offense, and imprisonment in the penitentiary for a term not exceeding two years.

The foregoing are among the prohibitions of Congress, but by no means exhaust the record of its prohibitions, against discriminations between persons using the carriers' transportation service.

A brief history of the rates involved in this

matter will aid in understanding the situation. We quote from the Commission's opinion herein (Record, p. 22):

> "Prior to Federal control the standard fare for interstate travel was in the greater part of the country approximately 2.5 cents per mile. For intrastate travel it was 2 cents per mile in many States. In some parts of the country, more particularly in the southern and western districts, the standard fare, both state and interstate, was higher than 2.5 cents.
>
> "In June, 1918, the Director General established the minimum standard fare of 3 cents per mile, both state and interstate, for application by railroads under Federal control. In August, 1920, the standard fare was increased 20 per cent, or to 3.6 cents per mile."

The Commission's action in August, 1920 (*Increased Rates, 1920*, 58 I.C.C. 220), permitted an increase of 20% in all passenger fares then in existence, thus establishing the fares which were at that time considered by the Commission to be just and reasonable for each sort of passenger service.

In 1922 the Commission investigated the general rate situation throughout the country and ordered a reduction of 10% in freight rates, but, though importuned to reduce passenger fares, refused to make any change therein (*Reduced Rates, 1922*, 68 I.C.C. 676). It thus reaffirmed its earlier decision as to what were the just and reasonable passenger fares for each sort of ser-

vice, including the standard basic fare of 3.6 cents per mile.*

These just and reasonable passenger fares were established by the Commission pursuant to the mandate of Congress in the Transportation Act of 1920, section 15*a* (41 Stat. L. 488). Under the authority of that provision the Commission fixed the fair rate of return upon the property used by the carriers for transportation service at 6%. On the basis of the tentative valuation of the transportation property of the carriers, the Commission determined the just and reasonable rates necessary to produce this fair return. In its decision in 1922 the Commission reduced the rate of fair return to 5.75%, but found, as we have stated above, that the existing passenger fares should be maintained as the just and reasonable fares for the purpose of producing that rate of fair return.

There has been no change in the authorized rate of passenger fares since the Commission's decision in 1922, unless the order herein is to be regarded as such. This we shall show is not the case.

* This court has previously recognized the Commission's action in establishing 3.6 cents per mile as the standard just and reasonable fare. See *Wisconsin R.R. Com.* v. *C., B. & Q.*, 257 U.S. 563; *New York* v. *United States*, 257 U.S. 591. (See also *South Carolina Fares and Charges*, 60 I.C.C. 290, 292; *Nebraska Rates, Fares, and Charges*, 60 I.C.C. 305, 307; *Indiana Rates, Fares, and Charges*, 60 I.C.C. 337, 340; *North Carolina Fares and Charges*, 60 I.C.C. 362, 364; *Louisiana Rates, Fares, and Charges*, 60 I.C.C. 467, 470; *Kansas Rates, Fares, and Charges*, 62 I.C.C. 440, 442; *Michigan Passenger Fares*, 60 I.C.C. 245; *Montana Rates and Fares*, 60 I.C.C. 61, 62; *Intrastate Rates within Illinois*, 59 I.C.C. 350; *Arkansas Rates and Fares*, 59 I.C.C. 471; *Ohio Rates, Fares, and Charges*, 60 I.C.C. 78; *Minnesota Fares and Charges*, 59 I.C.C. 502, 504; *Wisconsin Passenger Fares*, 59 I.C.C. 391, 393.)

Upon the record in the instant case the Commission found that the net railway operating income of the Class 1 carriers in the Eastern Group for the seven months ending July 31, 1922, was only 4.76% (Record, p. 21). The seven months ending July 31, 1922, represented the latest period for which statistics were available at the time of the proceedings before the Commission. The petitioners and the intervening petitioners before the District Court, and the appellees herein, are substantially the same as the Class 1 carriers in the Eastern Group. The record before the District Court and the record herein shows that for the entire year 1922 the rate of return on the tentative valuation of the Class 1 carriers of the Eastern Group was even less than that for the first seven months of the year, being but 3.78% (Record, p. 69). It thus appears that the rate of return received by these carriers falls far below the fair return established by the Commission in 1920 and 1922 pursuant to the mandate of Congress.

The Commission's order in suit would tend still further to reduce the net railway operating income of the Class 1 carriers in the Eastern Group below the fair return for which Congress directed the Commission to provide.

The interchangeable mileage or scrip ticket, which had its inception in the desire to give concessions and rebates, had long been condemned by the carriers (Record, p. 23). It was abolished by the Director-General on June 10, 1918, and has never been re-established at a reduced rate, although coupon tickets at the standard rate have been used since that time

interchangeable over all roads which care to participate in the use thereof (Record, pp. 23, 24).

The loss to the appellees herein which it is estimated would result from the Commission's order complained of is approximately $32,000,000 a year (see *infra*, p. 62).

The record shows that, excluding commutation service, which is now recognized by the Commission as a separate branch of the carriers' business, the standard fare of 3.6 cents per mile has been approximately realized by the carriers. Page 1 of Exhibit 50, an exhibit prepared and introduced into this record by the Commission itself (see Record, p. 160), shows that the average revenue per passenger mile for all traffic, excluding commutation, is 3.481 cents. This figure is for the first six months of 1922, which are shown by the same Exhibit not to differ relatively from the figures for 1921. The passenger miles which yielded this revenue constituted 13/16 of the whole passenger service (p. 1, Exhibit 50, Items 19,* 26, and 29). In other words, commutation traffic amounts to only about 19% of the total passenger traffic, and the other 81%, which includes excursion and tourist fares, yields to the carriers 3.481 cents per passenger mile.

It is a matter of general knowledge that the cost of commutation service, with its large utilization of equipment, its heavy loading per car, and its absence of the expense of handling baggage and Pullman service, is substantially

*It is apparent that items 26 and 29 are stated in thousands of miles, because their total would not otherwise equal item 19.

lower than the cost of ordinary passenger service. It is therefore fair to assume that the operating ratio for passenger traffic other than commutation is at least as great as that found by the Commission for the entire passenger service. For the year 1921 this was 85.24% (Record, p. 21).

Assuming this operating ratio for passenger service other than commutation, it is apparent that out of the revenue of 3.481 cents received from every passenger carried one mile, it costs the railroads 2.97 cents to transport him (85.24% of 3.481 cents).

If it costs the railroads 2.97 cents a mile to transport a passenger, and if the new tickets are sold for 2.88 cents a mile, it is evident that the actual out-of-pocket loss to the carriers will be 9/10 of a mill per mile. And this does not allow for any additional cost to the carriers in the handling of the new tickets.

These computations, which are based upon actual figures in the record, show the fallacy of the argument suggested in the brief for the International Federation of Commercial Travelers Organizations at pages 36 ff. and 104 ff. The computations in that brief are based upon estimates rather than on the actual figures to be found in the record. For example, the figure of revenue per passenger mile for all traffic is computed as 3.03 cents, whereas Exhibit 50, to which we have referred above, expressly shows for all traffic 3.086 cents for the year 1921, 3.127 cents for the first six months of 1921, and 3.049 cents for the first six months of 1922. All computations of the Commercial Travelers are

based upon the entire passenger traffic, and do not exclude the commutation traffic. As we have stated, Exhibit 50 shows the figures for passenger traffic other than commutation for the first six months of 1922. It is manifestly unfair to include the low commutation figures for revenues and costs in any general computation bearing upon the adequacy of a rate for a service which has no relation to commutation. Obviously no one is going to use a scrip ticket costing 2.88 cents in place of a commutation ticket costing on an average slightly over 1 cent. Furthermore the Commission has not only sanctioned, but required, the separation of commutation traffic from other passenger traffic in the carriers' returns (see p. 70, *infra*).

It appears by the record that the cost of printing, selling, and accounting will be greater in the use of these interchangeable scrip tickets than in the use of the standard-form ticket to the extent of at least $1,680,000 a year, and that the work of collecting and handling the tickets will be increased by a very considerable, but indefinite, amount, due to the greater burden upon the ticket sellers, ticket collectors, and passenger agents, and the necessary incidents of policing to prevent scalping and transferability (Record, pp. 110-116). It must be remembered, further, that before any of the additional expense involved in handling these tickets or any of the loss to the carriers in selling them at a reduced rate can be made up, there must be an increase in travel on the part of the users of these tickets to the extent of 25%, because any one who purchases 2500 miles of transpor-

tation for the price of 2000 miles as a practical matter receives free transportation to the extent of 500 miles, or 25% of the amount of transportation for which he has paid.

The tickets prescribed by the order are to be sold at the rate of 2.88 cents per mile. If the actual cost to the carriers of transporting each passenger one mile is 2.97 cents, as we have indicated above, and if that cost is materially increased by the additional expense involved in handling these tickets, it is obvious that the cost of the service rendered to holders of these tickets will be very substantially greater than the price at which they are sold. In other words, the rate will be actually both non-compensatory and confiscatory.

An examination of the rules and regulations which the Commission has prescribed immediately shows how much the work and cost of issuing these tickets are increased over the single one-way ticket (Record, pp. 47-54). The ticket agent must paste a photograph of the purchaser on the ticket. He must procure the signature of the purchaser. The ticket agent must sign it himself. The ticket agent must write in the name, business occupation, and residence of the purchaser. When the ticket agent issues the exchange passage ticket he must mark it "scrip," with the number of the scrip book written on the ticket in ink. When the ticket is presented for transportation the ticket agent must detach sufficient coupons and issue the ordinary one-way ticket. Where the passenger takes a train at a non-agency station the conductor of the train must endorse on the back of the coupons lifted the names or num-

bers of the stations between which the coupons are honored. He must examine the scrip book to identify the passenger with the photograph. When baggage is to be checked the exchange passage ticket and the scrip-coupon book must be presented to the baggage agent. Wholly or partially used scrip books must be redeemed by the issuing carrier. Whenever a scrip book or exchange passage ticket is presented for any purpose the holder must be identified as the original purchaser to the satisfaction of the officer or agent.

Whether the sale of such tickets will produce a larger volume of traffic the Commission finds to be wholly a matter of speculation (Record, pp. 27, 28). Experience of the past does not justify any finding that the volume of passenger travel will be increased to any such extent as to offset the perfectly obvious and determinable losses entailed by the order (Record, p. 28). As an illustration, the removal on January 1, 1922, of the war tax of 8% on passenger fares did not measurably stimulate passenger travel during the next six months (Record, p. 25). On the contrary, passenger traffic declined very appreciably in volume during that period (Record, p. 22). The carriers in the Eastern Group would have to perform well over one billion additional passenger miles of service to merely make up the loss of revenue (see p. 71, *infra*). The Commission finds that there is no analogy between the wholesale principle in the mercantile world and the wholesale sale of transportation as represented by the interchangeable ticket (Record, p. 26). In fact, the ticket is bought at wholesale, but the service ren-

dered is a retail service. The order is confessedly an experiment, and is so described by the Commission (Record, p. 28).

While the provisions of the amendment permit the Commission to make certain exemptions upon evidence submitted, the Commission's order is applicable to all Class 1 carriers; all others are exempted, and the exemption is based upon little or no evidence (Record, p. 29). And the Commission, after exempting all except the Class 1 carriers, permits any exempted carrier to issue interchangeable coupon tickets, and thus impose upon the Class 1 carriers all the risks of giving transportation upon the credit of an indefinite number of possibly irresponsible small roads all over the United States. The Class 1 carriers are required to issue these tickets at the reduced rate and bear the burden of printing, selling, and accounting for the proceeds, although the purchaser may never travel a mile upon the lines of the selling carrier.

Argument.

I.

The Commission Erred in Construing the Amendment to Require the Carriers to Issue Interchangeable Tickets at Reduced Rates.

The District Court found that the Commission in making its order misinterpreted the statute under which it purported to have acted. A comparison of the report of the Commission with the language of the statute and the opinions of the dissenting Commissioners clearly bears out this conclusion of the District Court.

The Commission in the early part of its report indicates that it recognizes that the statute does not require, either expressly or by intimation, a reduction in rate. (This point is emphasized in the brief for the International Federation of Commercial Organizations, at p. 27, but that brief appears to overlook the contradiction between the early language of the Commission and that used in the latter part of its report.)

At pages 20 and 21 of the record the Commission points out that one of the questions to be determined by it is what is the just and reasonable rate for the proposed tickets. It comments upon the fact that the statute is mandatory in requiring interchangeable tickets, but that it is left to the judgment of the Commission to determine the rate at which such tickets shall be issued.

In its conclusion, however, the Commission uses the following language:

> "The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an interchangeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare" (Record, p. 27)—

and again:

> "In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an ex-

perimental period. In no other way can the apparent purpose of the law be given practical effect" (Record, p. 28).

Commissioner Daniels, who dissented in part, agrees with the majority in their interpretation that a reduction is required by the statute. At page 33 of the record he said:

> "I think it difficult, if not impossible, to escape the conclusion that the intent of the amendment was to require us to prescribe in connection with mileage books or scrip coupon books a fare per mile less than the basic fare of 3.6 cents per mile."

The passages just quoted from the majority opinion of the Commission lead the District Court to remark:

> "It is clear from the record that the commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates" (Record, p. 91).

The court points out that there is nothing in the record to show that the Commission would have reached this conclusion had it not been for "what it conceived to be the plain spirit and theory of the amendment." The court expresses uncertainty as to whether the majority of the Commission interpreted the Act as mandatory in regard to a reduction of the rate, or whether they acted—

> "upon an assumed desire of the Congress,

> though not expressed by the amendment in mandatory form, that they should"—

reduce the rate, holding that in either case the Commission's action was without warrant of law (Record, p. 92).

That the court correctly understood the Commission's language and action appears from the dissenting opinions of Commissioners Hall and Eastman. The former, at pages 31 and 32 of the record, said:

> "On the record now before us it was not shown, indeed there was no attempt to show, that this basic fare is not still just and reasonable. On the contrary, the whole showing was based on the premise that this basic rate should be retained, but that some passengers, those who purchased these tickets, should receive transportation at lower rates than other passengers.
>
> "One after another the grounds on which this was urged are dismissed by the majority as unsubstantiated until the 'class' theory is reached. That, and the 'obvious spirit' or 'apparent purpose' of the statute, as the majority see it, alone support their finding that the rates resulting from sale of scrip coupon books in the denomination of $90 at a reduction of 20 per cent will be just and reasonable for this class of travel.
> . . .
>
> "The majority say:
>
> " 'The spirit and the apparent theory of the law is that carriers shall be required

to sell such a ticket at something less than the standard fare, . . .'

"That requirement was omitted from the bill before it became law. In place of it was substituted the direction to us to require, after hearing, issuance and acceptance of tickets at just and reasonable rates. I submit that the fairer construction of the act is that the Congress expected us to determine in this case, as in any other, what the just and reasonable rate would be. If that rate is the standard rate—and to my mind nothing in this record shows that any lower rate would be just and reasonable—we should prescribe that rate and give our reasons in our report. . . .

"Special privilege dies hard, and the craving for it never dies. But I see no good reason why, reading the act as it is written, we should give to it the gloss for which these organizations contend. . . .

"That the conclusion reached by the majority is in legal effect arbitrary and based upon an erroneous conception of this commission's powers and duties seems to me apparent from the report itself, which classifies not only passengers but carriers according to their means. The record contains nothing which convinces me that the use of this form of ticket will reduce the cost of service and therefore entitle the holder to a lower rate. The report does not so find, as I read it."

Commissioner Eastman, at page 38 of the record, said:

> "The conclusion of the majority is founded upon two premises:
>
> "(1) That the 'spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare'.
>
> "(2) That the reduced fare will stimulate traffic.
>
> "With reference to the first premise: The law merely directs us to require carriers to issue 'interchangeable mileage or scrip coupon tickets at just and reasonable rates'. Nothing is said about rates 'less than the standard fare', and I am not ready to believe that Congress wished us to imply something which it was unwilling to say openly."

On the basis of the majority's interpretation of the statute, the Commission purported to find—

> "that the rates resulting from that reduction will be just and reasonable for this class of travel" (Record, p. 28).

In contrast with this so-called "conclusion" we call attention to the express findings of the Commission, summarized at length at page 36 of this brief, which indicate, as Commissioner Hall pointed out in the passage just quoted, that one by one the arguments adduced by the proponents of the reduced rate were found by the Commission to have no weight.

The only possible justification which the majority found as a basis for the reduction of rates

was the hope that traffic might thereby be sufficiently stimulated to make up the loss in revenue. As we shall show hereinafter, not only is this hope absolutely unsupported by anything in the nature of evidence, but it rests, as the Commission itself admitted, in the "realm of speculation," and it constitutes an experiment which the Commission, absolutely without justification of any sort in the record or in the statute, attempts to force upon the railroads.

Counsel for the Commission has attempted to show that the Commission did not act under any misinterpretation of the Act or upon any assumed intention of Congress. His brief, at page 19, disclaims any intention of contending that the statute should be interpreted in a manner to do violence to its language, but asserts that the expression of the opinion by the Commission that Congress expected it to prescribe a rate lower than the existing standard rate "is not the equivalent of such an interpretation." The Commission surely cannot find in the language of the Act any statement by Congress that it expects the rate to be less than the established standard. The brief practically admits in the passage just referred to that the Commission did act upon the supposition of such an expectation by Congress. What better justification could be found for the District Court's analysis of the basis of the Commission's action than this argument contained in the Commission's own brief?

The statute does not say that the tickets shall be issued at reduced rates. It requires "just and reasonable rates." On its face there is no

reason for assuming that Congress intended to require the Commission to reduce the rates.

The Commission, however, by going outside the language of the statute, found in the debates of Congress what appealed to the majority as a valid reason for interpreting the Act to require a reduction in rate. This was manifestly error. No rule of statutory construction is better settled than that a statute must be interpreted without outside aid if its meaning is clear. This court has repeatedly held that only when a statute is ambiguous is there any warrant for looking at its legislative history to determine its meaning. *R.R. Commission of Wis.* v. *C., B. & Q.*, 257 U.S. 563; *Penn. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198; *Caminetti* v. *United States*, 242 U.S. 470, 490.

If the legislative history of this particular statute is to be considered, however, it indicates beyond doubt that the Commission entirely mistook the intent of Congress. It is true that there was considerable agitation before committees of Congress and on the floor of Congress for an amendment to the Interstate Commerce Act which would provide for reduced rates for commercial travelers.

The history of the legislation finally embodied in the amendment of August, 1922, shows that some fourteen different bills were introduced in April and May of 1921, some in the Senate and some in the House, some of them suggesting the establishment of interchangeable mileage tickets for the use of commercial travelers at a rate 20% less than the regular rate of passenger fares, some of them suggesting inter-

changeable five thousand mile tickets to be sold at 2½ cents a mile, and some suggesting interchangeable tickets of one thousand, two thousand, and five thousand miles, to be sold at a reduction of 33⅓% from the regular passenger rate. All of these bills went to the respective Interstate Commerce Committees of the two Houses, with the result that Senate Bill 848 was reported out of the Senate Interstate Commerce Committee and provided for interchangeable non-transferable five thousand mile tickets to be sold at the rate of 2½ cents per mile. This bill was, however, amended in the Senate on the motion of Senator Cummins by the elimination of all mention of a reduced rate and a substitution of the words "at just and reasonable rates." In Appendix A of this brief we set forth the fourteen bills referred to, and in Appendix B a summary of the legislative history of the statute, together with some of the comments made upon it by committee members and spokesmen.

The bill does not undertake to define any new class of travelers. All mention of commercial travelers has been eliminated.

It is highly significant that during the very period when this bill was under discussion by Congress, on May 16, 1922, the Interstate Commerce Commission gave expression to the following oft-repeated doctrine:

> "We have no authority to require carriers to establish for particular passengers or particular occasions special fares lower than the regular fares" (*Reduced Rates, 1922, supra*, p. 729).

As we shall show elsewhere (*infra*, pp. 30-34), this doctrine, based on section 22 of the Commerce Act, has been universally recognized and enforced by both the Commission and the courts, and Congress must be assumed to have had it in mind in amending that section.

It is a cardinal rule of statutory construction that a provision eliminated by Congress in its consideration of legislation shall not be inserted by a court, or an administrative officer or tribunal, by implication. *United States* v. *D. & H. Co.*, 213 U.S. 366, 414; *Southern Ry.* v. *United States*, 222 U.S. 20, 25; *Penn. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198; *Lapina* v. *Williams*, 232 U.S. 78, 89; *Carey* v. *Donahue*, 240 U.S. 430, 436; *United States* v. *St. P., M. & M. R.R.*, 247 U.S. 310, 318.

The words "just and reasonable rates" are the same words used in section 1, paragraphs 4 and 5, of the Commerce Act (41 Stat. L. 474), which require every common carrier to establish "just and reasonable rates and fares" and that all charges made for service rendered in the transportation of passengers shall be "just and reasonable."

By section 15 the Commission is authorized to determine and prescribe what will be "just and reasonable" fares or rates (41 Stat. L. 484).

By section 15*a*, paragraph 2 (41 Stat. L. 488), it is provided as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

> tories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The statute now under discussion is an amendment to the Commerce Act. The words "just and reasonable rates" in this amendment must have the same meaning that they have in other portions of that Act. The amendment was enacted with full knowledge by Congress of the meaning which prior legislation and administration had attached to the phrase, and of the action of the Commission in August, 1920, and in May, 1922, in establishing and maintaining 3.6 cents per mile as the basic just and reasonable passenger rate. The debates in Congress occurred both before and after the latter decision of the Commission, and the statute in question was enacted on August 18, 1922.

By every recognized canon of statutory construction the amendment in its use of the language "just and reasonable rates" referred to the same sort of standard that the Commission had previously applied in rate making. It cannot

be construed as a direction to the Commission either to lower or to increase rates unless the ordinary criterion of justness and reasonableness so requires. "Where provisions of a statute had previous to their reënactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary." *Heald* v. *District of Columbia*, 254 U.S. 20, 23. (See also *National Lead Co.* v. *United States*, 252 U.S. 140, 146; *Louisville Cement Co.* v. *I.C.C.*, 246 U.S. 638, 644; *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 199; *Latimer* v. *United States*, 223 U.S. 501, 504; *United States* v. *Bailey*, 9 Pet. 238, 256.)

The whole history of the Interstate Commerce Act and its various amendments discloses the vehemence with which Congress has always legislated against discriminatory rates. The comprehensive manner in which all possible kinds of discrimination have been provided against and the severity with which they have been punished absolutely preclude the inference that Congress, after thirty-five years of struggle to suppress discrimination and make it impossible, should itself have legislated with the object of producing discrimination—and discrimination in favor of a class of persons who should be the last class in the world to be so favored, because the members of that class are amply able to pay the standard fare. On the other hand, the class discriminated against consists of the working man and woman, the artisan, the occasional traveler, and all those who have not $72 available to take advantage of the reduced rate.

As we have pointed out above, Congress had

itself, by section 22, of which the amendment became a part, defined the classes of persons who might be favored by the carriers in respect of reduced rates. The persons so defined were ministers of religion, indigent persons, and inmates of soldiers' and sailors' homes.

While it was suggested by the court in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad,* 145 U.S. 263, that the above-mentioned classes were illustrative rather than exclusive, it cannot be doubted that any extension of these classes must be based upon a clear showing of a proper relation between the favored class and the cost of transportation of such class, that is to say, if the classes defined in section 22 are to be in any wise extended by judicial interpretation, either of the Commission or the court, they can be extended only to those classes which can be brought within a well-defined principle, justified either by direct reduction in cost of service or by indirect reduction in cost of service by reason of stimulation of travel.

It is incredible that, when Congress has rejected during a discussion of the measure express provisions for a reduced rate, and substituted language which points not at all to a reduced rate, it intended the Commission to imply an intention to create a new class of travel to be carried at a reduced rate.

It is conspicuous from the Commission's report that it established a reduced rate for interchangeable scrip-coupon tickets, not at all because of any merits of the case of those who seek such reduced rate or any convincing gain to be made by the carriers which is outside the realm of speculation, but simply and solely be-

cause the Commission conceived that Congress had given it a mandate to order reduced rates for that class of persons who could afford to buy transportation at wholesale and who had $72 in their pockets to pay for it.

The inequity and injustice both to the carriers, who lose a large amount of revenue, and to the very large class of persons who are unfairly discriminated against has been again and again condemned by Congress and by the courts.

The statute gives to the Commission the power to prescribe in its discretion "whether such tickets are transferable or non-transferable." This language is enough in itself to show the Commission's error in interpreting it as requiring a reduction in rate. If Congress had so intended, it would not have given the Commission discretion to make such tickets transferable. A transferable ticket at a reduced rate, no matter in what denomination, would immediately supplant the standard-rate tickets. No one would pay a dollar for a standard ticket when he could participate in the use of a ticket purchasable for less than a dollar. It is clear from this provision that Congress contemplated at least a possibility that these interchangeable tickets would be issued at the full standard rate.

It must be borne in mind that the statute under which the Commission purported to make this order is an amendment to section 22 of the Act to Regulate Commerce. This, of course, indicates that it has a special relation to that section and makes it necessary that its history and interpretation be briefly discussed.

Section 22, as originally enacted in 1887, and amended in 1889 and 1895 (24 Stat. L. 387; 25 Stat. L. 862; 28 Stat. L. 643), is given in full in Appendix E hereof (p. 191). The Act of August 18, 1922, now under consideration, made no change in the language of the section, but gave it a paragraph number, and added paragraphs 2 and 3 (42 Stat. L. 827). (See App. E, p. 193.)

The meaning of what is now paragraph 1 of section 22 has been recently discussed by this court in the case of *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U.S. 318. At pages 323 and 324 the court said:

> "Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose [citing cases]. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument by which a carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited, is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the Act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential

> treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier. . . .
>
> "There is nothing in *Interstate Commerce Commission* v. *B. & O. R.R. Co.*, 145 U.S. 263, 278; *L.S. & M.S. Ry. Co.* v. *Smith*, 173 U.S. 684; or *Penn. R.R. Co.* v. *Towers*, 245 U.S. 6, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them."

A footnote explaining the reference to the decisions of the Interstate Commerce Commission referred to at the end of the above quotation reads as follows:

> "Section 22 has been construed by the Commission as conferring upon carriers such permission to furnish transportation at reduced rates or free, in certain cases; as not conferring upon any shipper or traveler a right to such transportation; and, ordinarily, as not conferring upon the Commission power to establish such exceptions to the normal rates and fares [citing ten I.C.C. decisions]. Conference Rulings provide, as to some reduced rates under section 22, that they must be filed and posted with the Commission; and as to others that they need not be. See Conference Rulings, Issued Nov. 1, 1917, Nos. 33, 36, 208e, 218, 244, 311, 452."

Abstracts of and quotations from the ten decisions of the Interstate Commerce Commission cited in this footnote will be found in Appendix C of this brief. The Conference Rulings referred to, together with two or three others on the same subject, will be found in Appendix D.

In addition to the ten I.C.C. decisions, exhaustive search has disclosed the following, which bear upon the subject under discussion:

In re Mileage, Excursion and Commutation Tickets, 23 I.C.C. 95, 96.

Carnegie Board of Trade v. *Penn. R.R. Co.*, 28 I.C.C. 122, 128, 129.

In re Mileage Books, 28 I.C.C. 318, 323, 324.

Rules and Regulations Governing the Checking of Baggage on Combination of Tickets, 35 I.C.C. 157, 160.

N.Y. Com. of Highways v. *Director-General*, 55 I.C.C. 619, 624.

Reduced Rates, 1922, 68 I.C.C. 676, 729.

In no one of these decisions or those cited in the footnote to the *Tennessee* case, and in no Conference Ruling, has it ever been held or suggested that any traveler or shipper had a right to compel any carrier to furnish it free or reduced transportation, or that the Interstate Commerce Commission had any power to require the carriers to furnish free or reduced transportation, except in the case of commutation tickets where carriers had previously, of their own volition, established such tickets.

The situation with regard to commutation traffic is in some respects unique. It had been

suggested by the Interstate Commerce Commission that commutation rates might be required of the carriers in cases where they had previously established such rates of their own volition and where a commutation business had grown up thereunder (*Commutation Rate Case*, 21 I.C.C. 428). This court in *Penn. R.R. Co.* v. *Towers*, 245 U.S. 6, approved that doctrine in an opinion which carefully differentiated commutation service which had been fostered and encouraged by the voluntary action of the railroads from other forms of special tickets, including mileage tickets at reduced rates.

The conclusion of the court, as expressed on page 17, is that the expressions of this court in the case of *L.S. & M.S. R.R. Co.* v. *Smith*, 173 U.S. 684, must be modified if and to the extent that they are inconsistent "with the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service." In brief, this court, in making the exception to the general rule, recognizes that the railroads cannot be compelled to grant a reduction in rates for a special type of service except in the case of commutation rates where the carriers have previously voluntarily established them, and only in that case.

It is not without significance that the International Federation of Commercial Travelers Organizations, in its brief herein filed as *amicus curiae*, at page 84, expressly admits that prior to the enactment of the amendment to section 22, in August, 1922, "it is possible that the Commission did not have the affirmative authority to require scrip book coupon tickets to

be issued at reasonable rates." *A fortiori* the Commission had no such authority to require such tickets to be issued at reduced rates.

To summarize, the interpretation of paragraph 1 of section 22 has always been that it does not give to the Interstate Commerce Commission any power to compel the railroads to grant a reduced rate to any particular class of traffic, with the single exception of commutation service which has previously been voluntarily established by the carriers.

It is this section as so interpreted to which the amendment of August 18, 1922, was added. The language of that amendment, which became paragraph 2 of section 22, does not state that the Commission shall have power to require the carriers to issue interchangeable mileage or scrip tickets at reduced rates. It does not change in any respect the rights of the carriers under paragraph 1 of the section, or the authority of the Commission.

II.

The Order is Void because there was No Substantial Evidence to Support it, and because the Commission's Action in Making it was Arbitrary and beyond its Authority.

It is fundamental that, where an administrative tribunal acts outside the scope of the authority conferred upon it by statute, or acts in an arbitrary manner, its action is invalid and void. In the present case the Interstate Commerce Commission did so act, for the following reasons:

A. There was no evidence to support its conclusion and order.

B. Its order is admittedly experimental.

C. The experiment cannot produce any better evidence than was available when the order was made.

D. The order imposes unreasonable burdens upon the railroads.

E. The rates prescribed are non-compensatory.

F. The order creates an unjustifiable discrimination between railroads.

G. The Commission delegated to certain railroads legislative power.

H. The order applies to intrastate commerce.

A. The Commission's conclusion as stated on page 28 of the record is:

> "In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect. . . . We further find that the rates resulting from that reduction will be just and reasonable for this class of travel."

We have here an attempt to justify by an empty finding of reasonableness an order which the Commission felt that its interpretation of Congress' unexpressed intention required it to make. The District Court has pointed out the error which the Commission made in its interpretation of the statute (Record, pp. 91, 92). Even if the statute meant what the majority of

the Commission interpreted it to mean, however, the Commission's order is void because there was no evidence before the Commission to support its alleged conclusion of reasonableness. The statute expressly requires that the rates for scrip tickets be just and reasonable. Congress and the Commission knew the meaning of these words, and the Commission attempted to justify its action by meaninglessly reciting them.

The detailed findings of the Commission may be summarized as follows: The net railway operating income of the Class 1 roads was below the rate fixed by the Commission as a fair return. The operating ratio for freight service was lower than for passenger service (Record, p. 21). There is no analogy between interchangeable mileage or scrip tickets and the wholesale or carload-rate principle (Record, p. 26). The evidence tends to show that any benefit which the roads might receive from advance use of money paid for such tickets would be more than offset by the additional expense of accounting for and safeguarding them, which additional expense is estimated at approximately $1,680,000 a year (Record, p. 27). The use of interchangeable mileage or scrip tickets sold at reduced rates would result in a reduction in fare on all transportation between points sufficiently distant from each other (Record, p. 27). It would produce, as estimated by the carriers, a decrease in passenger revenue amounting to 6% of the total, or approximately $60,000,000 a year (Record, pp. 26, 39). "A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced"

(Record, p. 27). "If carriers are to be required to issue a mileage or scrip coupon ticket at a reduced fare it must be mainly upon the assumption that travel will be stimulated thereby" (Record, p. 27).

These findings show the substance of the testimony before the Commission and its line of argument in reaching its so-called conclusion that the prescribed rates would be just and reasonable. The carriers are not earning as much money as they should. Passenger service is less remunerative than freight. The use of the tickets in question will increase the cost of passenger service and will decrease its revenue. There is therefore no justification for a reduced rate unless it can be found in the possibility that passenger travel will be so much increased by the reduction in rates as to more than offset the greater expenses and lesser revenues. On this point the Commission made the following findings:

> "The evidence indicates that mileage tickets were primarily issued, not for the purpose of stimulating passenger travel but as a means of inducing shippers to route freight over particular railroads" (Record, p. 23).
>
> "The record does not support the statement that the falling off in revenue passenger-miles during 1921 and the first six months of 1922 was due chiefly to the high level of passenger fares. This confirms what we said in *Reduced Rates 1922*, 68 I.C.C. 676, where we pointed out that the decrease in revenue passenger-miles in 1921 was the result of many contributing causes which in-

cluded business depression, the increased use of motor vehicles, the improvement of highways, and the high level of passenger fares. The passenger fare was undoubtedly a contributing cause, but it is contrary to the evidence to say it was the only or even the chief cause. The removal on January 1, 1922, of the war tax of 8 per cent. on passenger fares did not measurably stimulate passenger travel during the succeeding six months" (Record, p. 25).

"That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much" (Record, p. 27).

"The question whether the mileage or scrip coupon ticket at reduced fare will stimulate travel sufficiently to increase or to equalize any loss in revenue that might result must remain in the realm of speculation until and unless such a ticket is established and experience recorded. The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles. The evidence as to the use of the mileage book is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues" (Record, pp. 27, 28).

The Commission thus admitted that it did not have before it any evidence upon which to base a finding that passenger travel would be increased to any appreciable extent by a reduction in fare.

The Commercial Travelers' prophesies of an increase were more than offset by contrary prophesies by representatives of the carriers, especially as the latter were based upon actual experiences of the railroads in the past, when rate reductions failed to produce increased travel. This evidence, though meagre, was the only evidence of the sort available, and is the only real evidence on the subject in the record (see Record, pp. 107, 108, 110, 124).

The discussion of this point by the Commission amounts to this, that, if this ticket stimulates enough new travel, it will be a benefit to the railroads; otherwise it will be an injury.

The Commission suggests that a reduction tends to increase travel. But a general reduction of 20% on all fares would better increase travel, developing travel by the general public even more than by the professional travelers. If the appellants' argument has merit, such reduction would be better for the railroads. Nothing in the Commission's report, however, indicates that a general reduction would be just and reasonable.

We have summarized above the detailed findings of the Commission showing that they do not in any respect support its alleged conclusion. We would not be understood, however, as asserting that the mere absence of findings would be fatal to the order. The entire record before the Commission was introduced in this

proceeding and was before the District Court. In narrative form, as required by the equity rules, it is before this court. The detailed findings are supported by the evidence before the Commission. There is no other evidence in the record which by any stretch of the imagination can be said to contradict them or to support the alleged conclusion.

In the hope of aiding the court to locate the evidence contained in the record before the Commission, we have prepared a very brief subject index of that record, which is appended to this brief as Appendix F. This index gives references to all of the evidence before the Commission bearing upon the several important topics in the case, the references being arranged so as to show which evidence was supplied by the carriers and which by the Commercial Travelers.

As the District Court said (Record, p. 91):

> "It is clear *from the record* (italics ours) that the Commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates."

And again:

> "The furthest the Commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing

the reduced rate, even for an experimental period" (Record, p. 92).

Our opponents have attempted to gloss over this lack of evidence by emphasizing certain optimistic guesses made by the Commercial Travelers. The argument of the Commission, for example, in its brief, at pages 11 and following, is to the effect that the Commission cannot be supposed to have made its order without being convinced that a sufficient increase in traffic would result from the reduced fares to more than make up the loss of revenue. The brief for the International Federation of Commercial Travelers Organizations attempts to be more specific in the matter. At pages 28 and 29 it quotes from the Commission's opinion those passages upon which it relies as showing that there was substantial evidence that traffic would be increased sufficiently to compensate the carriers for the loss in revenue. The very language quoted, however, shows the nature of the so-called "evidence" relied upon. The Commission states that the traveling men "urge" that the reduced-fare tickets "would stimulate travel" sufficiently to offset revenue decreases; that the use of such tickets "would in all probability" result in increased revenue; and that they "would" stimulate freight traffic (Record, p. 25). The report also refers to the recognized rule that decrease in price increases sales, to the fact that the carriers voluntarily sold mileage books at reductions prior to federal control, and that certain other forms of reduced rates create traffic. The Commission thereupon states that it "may

fairly be assumed" that "some" additional traffic would be created "although it is impossible to determine how much" (Record, p. 27). And finally, on the basis of all of this "evidence," which we must assume to be all that the Commercial Travelers were able to discover in the record, and which is all that can be found therein (see Appendix F), the Commission concludes "that the rates resulting from that reduction would be just and reasonable for this class of travel" (Record, p. 28).

These guesses do not even constitute that "mere scintilla of proof" which is always held to be insufficient as a basis for an administrative order. As this court said in *I.C.C.* v. *Union Pacific R.R. Co.*, 222 U.S. 541, at page 548, a decision of the Interstate Commerce Commission cannot "be supported by a mere scintilla of proof."

An order of the Commission fixing rates, if contrary to the evidence or unsupported by *substantial* evidence, is invalid.

> *A., C. & Y. Ry.* v. *United States*, 261 U.S. 184.
> *I.C.C.* v. *Union Pacific R.R. Co., supra.*
> *Florida Eastcoast R.R.* v. *United States*, 234 U.S. 167.

The Commission, as the District Court has found, made this order under a mistaken view of the statute, believing that it required a reduction in rates regardless of the facts and regardless of their own judgment. The Commission acted "by way rather of fiat than of adjudication" (see *I.C.C.* v. *Northern Pacific Ry.*, 216 U.S. 538, 544).

B. The order is admittedly an experiment. Both the District Court and the Commission itself so interpret it (Record, pp. 91, 92, 27, 28).

The Commission has no authority to try experiments with the property of the railroads. Any such course of action is clearly outside of its powers and amounts to a deprivation of property without due process of law and a taking of private property for public use without just compensation.

If it be argued that any order establishing rates for the future is in a sense experimental, and that therefore this order is as justifiable as an ordinary rate order, we answer that no order can be upheld which is experimental in the sense that it is not based on evidence. A rate order is based upon past and present conditions combined with the best judgment of an expert body as to what those conditions will be in the future. But the best judgment of an expert body is a very different criterion from mere guesswork. In the order here involved, an expert body did not determine on the basis of its best judgment that the traffic would be sufficiently increased to increase net revenues. The Commission practically admit that the probabilities indicate exactly the opposite, and they expressly admit that they acted on the basis of what they consider a mandate from Congress. The order is therefore an experiment, which is based on mere speculation, for the purpose of finding out what conditions will be, rather than on any formed opinion as to what they will be.

In—

Rowland v. *St. Louis & S.F. R.R. Co.*,
244 U.S. 106—

this court, in an unanimous opinion, holding a rate confiscatory, used the following language (p. 110):

> "It is objected that this does not allow for the increase of travel that would follow the reduction. The Railroad replies and the court below found that the increase is mainly at the expense of interstate revenue when the combined local rates are less than the interstate one. Whether this exhausts the matter or not we are of opinion that upon this record the supposed increase is too conjectural properly to affect our conclusion. The direct effect of the reduction is plain—the remote one is at best a guess."

The United States District Court in Missouri used the following language (*Kansas City Ry. Co.* v. *Barker*, 242 Fed. 310, 315):

> "It must at least appear that the net aggregate return to the carrier is just, fair and reasonable; and this does not appear, to our satisfaction, from the statement of the Commission itself. . . . We think an actual test of the effect of these rates upon the business of complainant would be ineffective, because during the pendency of this litigation . . . there could be no appreciably increased settlement of the suburban districts affected."

See also *C., R.I. & P. Ry. Co.* v. *Ketchum*, 212 Fed. 986, 999.

It is argued that this court has recognized the desirability and propriety of making a test

of rates for a specified period to determine whether or not they will be confiscatory. The following cases are cited in support of this doctrine: *Knoxville Water Case,* 212 U.S. 1; *Willcox* v. *Cons. Gas Co.*, 212 U.S. 19.

We would point out that this is not the question here. First, even if such a test is permissible to determine whether or not rates will be confiscatory, it cannot be used, because it is not necessary, to determine whether they will be discriminatory. Second, the cases cited as the basis for this doctrine are readily distinguishable. In those cases the evidence indicated that the original rates were unreasonably high. No question of discrimination was involved, and the evidence pointed to a probability that the new rates would be compensatory. In the present case the original rates were not shown to be unreasonably high, but, on the other hand, were expressly shown to be those fixed by the Commission as the just and reasonable rates. The new rates were shown to be discriminatory, and the evidence indicated the probability that they would be non-compensatory.

The Commission in the former of these two situations has authority to remedy the existing unreasonably high rates, and it may do so in spite of the possibility that the new rates would be non-compensatory. In the present case the Commission has not the power to change the existing rates, because they have not been shown to be unreasonable and because it has been shown that the proposed new rates would in all probability be non-compensatory.

C. The result of this experiment, if permitted, would be to produce no better evidence as to the reasonableness of the rates in question than that which was available to the Commission at the time it made the order. The Commission requires the railroads and other interested parties to keep records of the use of its scrip-coupon tickets. The purpose of these records is of course to accumulate information with regard to the effect of the use of the tickets upon the amount of traffic and the net revenue of the carriers. This evidence, after it has been accumulated at great labor and expense and presented to the Commission, will indicate how many tickets of the sort prescribed were sold and how many persons bought them. It will not indicate how much farther those persons traveled than they would have traveled if they had not had such tickets. In order to determine this question a great mass of testimony will have to be taken from a very large number of individuals and organizations. Such testimony will be of no greater value than would the testimony of the same individuals and organizations at the present time with regard to whether, during the past year, they would have traveled more than they did if the tickets provided for in this order had been available. Testimony is no more valuable nor available which states how much the witness would have traveled if certain rates had been in effect than is testimony which states how much the witness would have traveled if such rates had not been in effect.

The only conceivable advantage that the Commission would have in accumulating evidence

after the experimental period would be that it would then know exactly how many users of these tickets there were and their names and addresses. Theoretically, therefore, the Commission could take testimony from every single individual who had used such tickets. Practically, of course, this procedure would be impossible. The Commission would have to limit its investigation to representative individuals, or in all probability to organizations of commercial travelers, hotel associations, and perhaps large shippers. Such organizations are not now unknown to the Commission. In fact they have been clamoring for special fares for years, and have been represented at all the hearings in this proceeding both before congressional committees and before the Commission itself.

If an experimental order is ever permissible (which we deny), it can only be upon the ground that it will produce evidence, otherwise unavailable, which will be more illuminating than any evidence obtainable without trying the experiment. This is not such a case.

D. The order is void because it imposes unreasonable burdens upon the railroads. As pointed out above, the Commission accepted the carriers' estimate that there would be approximately $1,680,000 per annum of additional expense to Class 1 roads involved in the selling, accounting for, and safeguarding of these scrip tickets. This amount, as was testified by witness Rose (Record, pp. 110-116; and see "Rules and Regulations," Record, pp. 47-54), represents the wages of extra accounting and ticket-selling em-

ployees who will be required for the handling of these tickets. A very substantial burden of time and effort will be entailed in connection with the sale of the tickets on account of the requirements concerning photographs, signatures, etc. A large amount of time and labor will be involved in the various procedures where identification is necessary, as, for example, in the exchange of the coupons for the special form of ticket, the use of such ticket for checking baggage, and the presentation of such ticket on the train. There is great danger of misuse of the tickets, with resultant additional loss to the carriers, because of the large number of individual agents of the carriers who will be required to exercise their discretion with regard to the sufficiency of the identification. Passport photographs are notoriously unlike the originals, and there will surely arise frequent cases of disagreement between the holder of the ticket and the ticket agent, baggage agent, or conductor, thus causing loss of time, inconvenience, and probably loss of money to some or all of the parties. Further complications in the nature of litigation arising out of refusals to accept tickets or out of wrongful use of tickets will aggravate this condition (compare *Bitterman* v. *L. & N. R.R. Co.*, 207 U.S. 205).

We do not argue that the Commission cannot impose reasonable requirements to safeguard the non-transferability of tickets where such a course is necessary, nor do we advocate the sale of scrip-coupon tickets at a reduced price which are transferable. We wish to point out, however, that a very important element in the administra-

tion and use of the tickets prescribed in this order is the expense, inconvenience, and confusion that will surely result, and we emphasize this element as an additional indication of the unreasonableness of the order and the rate thereby imposed.

In this connection we call attention to paragraph 3 of section 22, imposing a very heavy fine upon any carrier which, through the act of any agent or employee, wilfully refuses to issue or accept these tickets or to conform to the rules made by the Commission. The fear of incurring this penalty will of course act as a deterrent in hundreds of cases where otherwise the agent of the carrier might suspect that tickets were being used contrary to the rules and regulations promulgated by the Commission. This will increase tremendously the burdens and dangers and loss just referred to.

E. The order is void because it prescribes non-compensatory rates. The Commission, as stated above, found that for the year 1921 the passenger operating ratio of Class 1 roads was 85.24 (Record, p. 21). This means that out of every dollar of passenger operating revenue 85.24 cents were spent to meet the cost of service.

The Commission's proposed order requires the carriers to perform exactly the same transportation service for holders of scrip tickets as for holders of standard tickets. Both will ride in the same trains and between the same stations, and both will have the same privileges. It is inconceivable that there should be any difference in the cost of the transportation service rendered (compare *Wis. R.R. Com.* v. *C., B. & Q.*, 257 U.S.

563, 588). There will, however, as pointed out above, be a difference in the cost of the administration of the tickets. The passenger operating expenses of the Class 1 roads will therefore be greater than before such tickets were issued.

This court has recently stated that a railroad is "entitled to just compensation, *i.e.*, a reasonable return on the value of its property used in the public service, and unless contracted away, that right is protected by constitutional safeguards which may not be over-ridden by legislative enactments or considerations of public policy" (*Paducah* v. *Paducah Ry. Co.*, 261 U.S. 267, 272).

The carriers estimated that 30% of all passenger travel would be performed by holders of scrip tickets. This involves roughly $300,000,000 of revenue. The 20% reduction amounts to $60,000,000. The additional cost of administering these tickets is estimated to come to $1,680,000 (Record, pp. 26, 27, 39). The mathematical result is plain. Out of operating revenues of $300,000,000 the railroads in 1921 paid 85.24% for operating expenses of this traffic, or approximately $255,720,000. Under the provisions of this order the cost of this traffic will be increased by $1,680,000, making the total expenses $257,400,000, while the revenues will be reduced by $60,000,000 to $240,000,000. The result indicates an operating ratio of 107.25% and an actual out-of-pocket loss to the carriers of $17,400,000 on this line of traffic.

In the case of *N. & W. Ry.* v. *West Va.*, 236 U.S. 605, 613, 614, this court applied the doctrine referred to above, and did so by means of the operating ratio of the railroads, although

this method is objected to by certain of our opponents herein.

We have pointed out above (pp. 11-12) that for the latest available periods the passenger operating ratio for the Class 1 roads was 85.24% (Record, p. 21), and the average revenue per passenger mile (excluding commutation) was 3.481 cents (Record, p. 160, Exhibit 50, p. 1). This indicates an average cost per passenger mile of 2.97 cents. The increased cost to carriers for the handling and policing of these tickets and the increased expense involved in handling the increase of traffic (if any) produced by these tickets will still further add to the cost of performing the service. The revenue to be received by the carriers from the sale of these tickets is 2.88 cents per mile. Even without taking into account the additional expense, the cost of 2.97 is grievously in excess of the revenue of 2.88. Furthermore, the operating ratio under discussion does not include taxes, and if the appropriate proportion of railway taxes be added to this expense, the deficit will be still greater. It is obvious that the operating ratio for this traffic is very much greater than that which was held by this court in *N. & W. Ry.* v. *West Va.* to be non-compensatory.

A very serious error which permeates the reasoning of the brief for the Commercial Travelers above referred to is found at pages 35 to 38 thereof, in which they argue that the fares ordered by the Commission will be higher than the average fare paid on the remaining passenger business of the United States. This conclusion is based on assumptions rather than the figures contained in the record (see p. 160, Exhibit 50, p. 1). Further-

more, it concludes commutation service, and it ignores the additional cost to the carriers involved in the use of the proposed interchangeable tickets.

This court, in *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U.S. 585, has expressly held that common carriers cannot be required to perform any particular part of their services at less than a compensatory return, even though the whole service is compensatory. The same doctrine was applied to passenger traffic in *Norfolk & W. Ry.* v. *West Virginia, supra,* 608, 609. If this be true of intrastate rates on coal in North Dakota, and of intrastate passenger fares in West Virginia, it must be equally true of rates on such an artificially selected class of passenger business as that involved in the use of these tickets.

F. The order is void because it discriminates between carriers. The statute permits the Commission to exempt certain carriers or parts of carriers from its requirements "where the particular circumstances shown to the Commission shall justify such exemption." Obviously, if this order were made effective upon one of two roads whose conditions were practically identical, it would amount to a discrimination against that road. One would be required to perform exactly the same service as the other, but would receive only 80% as much for it. If there were competition between these two roads, the road which was not required to issue these tickets would undoubtedly put them into effect if it found that competitive conditions were depriving it of traffic. Thus this road would be in a position to take

advantage of the situation either way, and would therefore receive an undue preference.

The only justification for requiring such tickets of some roads and exempting others would seem to be where the actual conditions upon the roads warranted the discrimination. As we shall show, however, in this case there was little or no evidence to support the Commission in the exemptions which it made. More than four hundred railroads were given blanket permission to take advantage of the order or not as they saw fit, and no reason for the discrimination was suggested except that some of these roads would not carry any traffic under these tickets or have any calls therefor if they were required to comply with the order (Record, p. 29). This reason appears to operate automatically to exempt the roads which fall within it, and therefore can hardly constitute a proper basis for the discrimination even as to roads which introduced evidence on the matter. Certainly it has no proper bearing upon those roads which did not introduce evidence and which do not fall within the reason.

The appellees are directly injured by this discrimination against them, and respectfully urge that such discrimination was not based upon evidence, and was arbitrary and unjustified.

G. The Commission acted beyond the scope of its authority and in an arbitrary manner in exempting from the effect of its order a very large number of carriers. The statute gives the Commission discretion to exempt from its provisions "either in whole or in part any carrier where the particular circumstances shown to the

Commission shall justify such exception to be made." There is no standard provided in the statute to guide the Commission's discretion in this respect. This in itself, as we point out below (pp. 119-121), is a delegation of legislative authority to the Commission which transcends the bounds of proper delegation of such power.

It is obvious from the language of the statute just quoted above that Congress contemplated an order applying to all the railroads in the country with the exception of those few roads or branches which for some special reason should be exempted. There was clearly no contemplation of a blanket exemption, leaving out of the scope of the order more than twice as many railroads as were included within it. It is true, as noted in some of the opposing briefs, that the roads exempted are for the most part small roads or switching companies. But they are nevertheless individual entities and in many cases vitally important as common carriers. Moreover, their financial responsibility is usually less, the smaller they are (*cf.* Record, pp. 155, 156).

The power to exempt contemplates the making of a general order from which certain individuals are excepted for reasons which affirmatively justify such exceptions. It does not permit the blanket exclusion of a large class of individuals without such affirmative justification. This court has recently held that a saving clause in an order of the Commission permitting exceptions from its terms upon proper showing cannot validate an order "affecting all rates of a general description when it is clear that this would include many rates not within the proper class or

the reason of the order" (*Wisconsin R.R. Com* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 580).

The order therefore goes beyond the power of the Commission under the Act.

The bill as passed by the Senate contained no provision for any exemptions. The Committee on Interstate and Foreign Commerce of the House of Representatives reported the bill to the House with various amendments, including one to insert the sentence providing for exemptions.

The report of Mr. Winslow, Chairman of the Committee, refers to this amendment as one of the two principal changes proposed by the Committee. His report describes it as "the provision for the exemption of certain rail carriers in case the Interstate Commerce Commission shall see fit to authorize the issuance of a mileage more or less general but not universal, as applied to all rail carriers" (67 Cong. 2d Session, House of Representatives, Report No. 1096).

On June 29, 1922, Mr. Winslow, in speaking of this proposed amendment and in reply to a question as to its meaning and purpose, said (Congressional Record, 67th Congress, Second Session, p. 10,461):

> "The theory is this, that the scale of prices for carrying a passenger a mile vary now under the regulations of the Interstate Commerce Commission from 3.6 cents per mile, as a minimum, up to 5 cents or 6 cents a mile, and above, I think, in some instances. Now, it might be, if the commission saw fit to get out a mileage book, that they could get out one covering the great majority of the railroads of the country at 3.6 cents per mile, but other

> railroads could not afford to carry passengers at that price. So, in order to get out a mileage book, in case they saw fit to order the issue of one, we provided that they could indicate the roads upon which the general mileage rate would be acceptable, profitable. As some other roads could not carry at the same rate per mile, we realized there should be a right for the commission to make exemptions. Hence this provision."

The amendment was thereupon adopted. This is the only reference to this amendment in the debates in the House. Clearly it refers to a mileage ticket in contradistinction to a scrip-coupon ticket. The suggested contingency could not arise in connection with scrip tickets, which are equivalent to money rather than to miles of transportation. There is nothing in either the language or the history of the clause in question to justify the Commission in a blanket exclusion of several hundred roads under the guise of "exemption."

An equally serious defect is to be found in the method which the Commission adopted in making this blanket exemption. The Commission's report (Record, p. 29) states that more than four hundred carriers filed applications for exemption, but that comparatively few of them introduced any evidence. The principal reasons assigned for exemption by short lines, electric roads, and switching and terminal carriers were that they were engaged chiefly in intrastate commerce, or that they handled a negligible amount of passenger traffic, or that they did not honor or sell passenger tickets to and from points on other

lines, or that they had no passenger service, or that there would be no demand from them for interchangeable scrip or mileage tickets. The Commission does not even limit its blanket exemption to carriers whose circumstances fall within these reasons. It proceeds, with practically no evidence before it, to find "that the particular circumstances shown to us warrant the exemption of all carriers by rail which are not included in Appendix C" (Record, p. 29). (See the remarks of Commissioner Hall in his dissenting opinion at pages 30 and 31 of the Record.)

This action was of course arbitrary and invalid, because without evidence. To make it worse, the Commission proceeds to provide that, if any carrier so exempted should thereafter decide to establish and use the scrip-coupon tickets provided for in the order, "our finding of exemption will not preclude them from doing so" (Record, p. 29). An admission of lack of substantial evidence!

In other words, the Commission gave to several hundred carriers the right to determine for themselves whether or not they should be subject to this order, and it did this practically without evidence and wholly contrary to the evident intent of the statute in permitting exemption. This action, as we have pointed out above, discriminates against the carriers which are not exempted; it is arbitrary and without the power of the Commission, and it amounts to a delegation of legislative power to carriers by the Commission, contrary to section 1, article 1, of the Constitution.

H. The Commission's action is invalid because it includes intrastate commerce. The order expressly provides that these interchangeable tickets shall be good on all passenger trains of all non-exempted carriers (Record, p. 55). They are not limited to use in interstate travel. As a practical matter it would be very difficult to impose such limitation, and would add greatly to the confusion and expense of the administration of these tickets. Such practical considerations, however, cannot enlarge the jurisdiction of the Commission. Neither Congress nor the Commission can prescribe intrastate rates. The order is therefore void in so far as it purports to do so.

Any passenger who uses one of the proposed interchangeable tickets for transportation between two points within a state would be traveling in intrastate commerce (see *Southern Pacific Co.* v. *Arizona*, 249 U.S. 472). The language of the order obviously permits such use of the tickets. The courts cannot save a statute or an order of the Commission by interpreting the language to include only that which the courts or the Commission had authority to include unless the language requires, or is sufficiently ambiguous to permit, such interpretation. Where, as here, the language is not ambiguous, it must stand or fall on the basis of its ordinary meaning (see *Employers' Liability Cases*, 207 U.S. 463, 500, 501).

The legislative history of this provision of the statute shows that, as the bill originally passed the Senate, it read:

"A just and reasonable rate per mile good

for interstate passenger carriage upon the passenger trains," etc.

The House Committee introduced an amendment to strike out the word "interstate," and this amendment, after a very brief debate, was carried (see Appendix B, pp. 140, 154).

The argument of the supporters of the House Committee amendment was that, as the Commission had jurisdiction only over interstate carriers, it could not act under this amendatory statute outside of that jurisdiction, but that, if the tickets were confined strictly to interstate travel, they would be of comparatively little use to the commercial travelers. The remarks of Senator Pomerene quoted in Appendix B concisely state that the House Committee amendment would introduce a constitutional difficulty. This amendment was accepted by the Senate nevertheless, and is embodied in the bill as enacted.

In this connection we call attention to the significant difference between the language of the statute and the language of the Commission's order. The statute provides for tickets "good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act." The Commission's order provides for tickets good "for the carriage of passengers on *all* passenger trains operated by said respondents" (italics ours—Record, p. 55). The "said respondents" included "all carriers by rail subject to the interstate commerce act" (Record, p. 18).

The Commission has, as Senator Pomerene foresaw (see Appendix B, p. 157), issued an order "making it applicable to intrastate business as well as to interstate business."

It may be argued that the recent decision of this court in *Railroad Commission of Wisconsin* v. *C., B. & Q. R.R.*, 257 U.S. 563, has upheld the action of Congress in extending the power of the Commission over intrastate rates. To this argument there is a conclusive answer. The *Wisconsin* case upheld an order of the Commission forbidding the state commission to require lower rates on intrastate traffic than those prescribed by the Commission for all traffic. The order of the Interstate Commerce Commission, however, which fixed a general rate level applying to intrastate traffic as well as interstate traffic was a special sort of order based upon two particular provisions of the Interstate Commerce Act as amended by the Transportation Act of 1920. These provisions were section 15*a*, requiring rates to be fixed so as to produce a fair return upon railway property, and section 13, paragraph 4, forbidding discrimination against interstate commerce. The circumstances of the *Wisconsin* case led the court to decide that, where the Commission had increased rates under section 15*a* by a general rate order applying to all traffic throughout the country, the state commission could not, by reducing certain rates, cut down the total revenue to be received by the carriers, thus imposing a discriminatory burden upon interstate commerce.

The *Wisconsin* case does not give to Congress or the Interstate Commerce Commission jurisdiction to fix intrastate rates in general. It is limited to cases of general rate orders for the purpose of establishing a basis for a fair return under section 15*a*. There is no such question

involved in this order, nor is there any attempt by any state to discriminate against interstate commerce such as gave rise to the Interstate Commerce Commission's right to act in the *Wisconsin* case.

Therefore the action of the Commission exceeded the scope of its authority, and the order is illegal and void because it invades the jurisdiction of the states.

III.

THE ORDER IS VOID BECAUSE IN MAKING IT THE COMMISSION VIOLATED SECTION 15*a* OF THE INTERSTATE COMMERCE ACT.

Section 15*a* of the Interstate Commerce Act, which was added to the statute by the Transportation Act of 1920, requires that the Commission, in the exercise of its power to prescribe just and reasonable rates—

> "shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to the fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: provided, that the Commission shall have reasonable latitude to modify or adjust any

particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

Pursuant to this section, the Commission in *Increased Rates, 1920* (*supra*) divided the railroads of the country into four groups—the Eastern, the Southern, the Western, and the Mountain Pacific—and fixed the tentative valuation of the Eastern Group at $8,800,000,000. In *Reduced Rates, 1922* (*supra*) it fixed the rate of return at 5.75%, and reaffirmed the valuation previously established, plus the net cost of additions and betterments made by the carriers since the time of fixing such valuation.

Under the rates and fares prescribed by the Commission and in effect at the time the investigation herein was made and the order in suit issued, the carriers in the Eastern group were not earning 5.75%, but were in fact earning only 3.78% on their tentative valuation (Record, p. 69). The Commission's order, as appeared from the record before it, involved a reduction in revenue of approximately $60,000,000 per annum for the railroads of the country, or approximately 6% of their total passenger revenue (Record, pp. 26, 39). The passenger revenues of the Eastern group for the year 1922 were approximately $540,000,000 (Record, p. 71). Six per cent of this is over $32,000,000, which represents the loss in net railway operating income which would be caused to the appellees by the enforcement of the Commission's order.

The Commission, therefore, in making this order required the carriers to establish rates

which would substantially reduce their net railway operating income at a time when their income was not sufficient to enable them to earn the rate of return required by section 15*a* of the Act. Section 22 directs the Commission to require the issuance of mileage or scrip tickets at just and reasonable rates. Section 15*a* requires it to fix rates which will enable the carriers to earn the return therein provided for. The Commission, therefore, in making this order violated the mandate imposed upon it by section 15*a*.

As this court has pointed out in the *Wisconsin* case, *supra*, at pages 582 to 588, the amendments to the Interstate Commerce Act incorporated therein by the Transportation Act, and particularly section 15*a*, which was called "the most novel and most important feature of the Act" (p. 584), have established a new federal policy, which has, as its main purpose, the providing of adequate transportation facilities for the people of the whole country. This ultimate purpose is to be effectuated by securing, in the first instance, adequate revenues for the carriers. It cannot be disputed that the carriers have not been earning, and are not earning, the return which, under the specific mandate of Congress, they should have, not only in their own interest, but in the interest of the people (Record, p. 21); and it must be obvious that, if the Interstate Commerce Commission can reduce revenues, as it proposed to do in this case, in total disregard of the provisions of section 15*a*, it can defeat the central purpose that Congress had in mind in passing this legislation.

In making this contention we do not suggest

that the amendment under which the Commission has acted in this case is inferior to the provisions of section 15*a*. We only claim that this amendment should be read in harmony with section 15*a*. As we have pointed out above, all parts of the Commerce Act must be read together. This court has noted "the dove-tail relation" between section 13 and section 15*a* (257 U.S. 586). Certainly there must be a similar relation between section 22 and section 15*a*, especially where the mandate to the Commission under both of these sections is to establish "just and reasonable rates.

The issue in the *Wisconsin* case involved a conflict of jurisdiction between the state and the federal governments. This court held that, in spite of the fact that the Commission's order therein involved cut into the jurisdiction of the state, it was nevertheless valid under the provisions of section 15*a* and paragraphs 3 and 4 of section 13. The new policy adopted by Congress in section 15*a* made it necessary for the federal authorities to infringe upon the state's jurisdiction to whatever extent might be required to safeguard the income of the national transportation system as provided for in section 15*a*.

In the instant case there is no conflict of jurisdiction between federal and state governments. The Interstate Commerce Commission itself has acted in such a way as to endanger the success of Congress' policy of a fair return for all of the railroads. The constitutionality of that policy has been expressly upheld and its importance emphasized by this court. If the jurisdiction of the states, which under our system must be

safeguarded by this court, was not a sufficient reason for permitting an obstruction of that policy in the *Wisconsin* case, certainly the desire of special interests for a special rate cannot here be allowed to work such an obstruction.

It cannot be said that the order here in question falls within the proviso of section 15*a* above quoted. That proviso confers upon the Commission power to meet the specific conditions relating to "any particular rate" or to different sections of the country. It cannot be construed to extend to a general reduction in the rates for a large class of travelers, which reduction would apply without reference to local conditions or to any individual rate.

IV.

THE COMMISSION ERRED IN THINKING THAT "THIS AMENDMENT CONTEMPLATES THAT CARRIERS SHALL BE REQUIRED TO RECOGNIZE AN ADDITIONAL CLASS OF PASSENGER TRAVEL AND TO PROVIDE A SPECIAL FORM OF TICKET WHICH SHALL BE ISSUED AT JUST AND REASONABLE RATES FIXED BY US TO COVER SUCH TRAVEL" (RECORD, PP. 22, 23).

The original form of the bills contemplated making commercial travelers an additional class of passenger travel, but such an idea was definitely rejected by Congress before enactment. All that we have said above with respect to the principles which forbid inserting by implication a provision definitely rejected by Congress applies to the interpretation placed by the Commission upon the amendment. The reasons which exist for reduced rates for commutation, excursion, and tourist fares and which have been well

understood and defined by the Commission apply in no sense to the purchasers of interchangeable tickets. The latter *do not* constitute a defined class who can be transported at less than the standard cost, and therefore are in no way entitled to any special rate.

Commutation, convention, excursion, and tourist fares are clearly distinguishable from the form of ticket here ordered.

> "In commutation fares both distance and time are determining factors" (Record, p. 22).
>
> "The convention fare is designed to take care of the movement of passengers within a limited time for a special purpose" (Record, p. 22).

Guaranties of a minimum number of persons to be carried are frequently required by carriers as a condition for granting the special fare (Record, p. 22). The excursion fare represents an intensified movement of passengers between particular points on particular days within a defined period (Record, p. 22). Tourist fares apply between resorts at definite seasonal periods (Record, p. 22).

The attempt to assimilate the new ticket to any of the above forms on the assumption that its users will constitute a new class within the reason existing for issuance of the tickets named is wholly fallacious. Each of the foregoing special classes has specific characteristics which distinguish it from passenger travel generally, and enable the carriers to perform the transportation in volume and at a reduced cost.

We quote from Commissioner Daniels (Record, pp. 34 *et seq.*):

"Commutation fares are based on the fact that many city workers live in relatively near-by suburban districts, journey daily to and from work, and make no demand for baggage service. The carrier can therefore with comparative certainty calculate in advance upon a steady, heavy, and daily volume of travel. This permits affording a rate of fare, lawfully open to all purchasers, but as a matter of fact utilized almost exclusively by a particular class. It is hedged about by the requirement of being used within the month for which the ticket is commonly valid. Its use is confined to stretches of line not unduly long. Parallel suburban electric lines often afford a competitive service which would render the discontinuance of commutation fares by steam roads practically impossible. This constant, heavy, and daily volume of travel over short stretches of line differentiates this kind of service from passenger service generally.

"The convention and excursion fares are characterized, not merely by the lower rate per mile, but by the virtually predictable volume of traffic which these fares evoke. They permit preparation in advance for accommodating a more or less certainly ascertainable number of passengers whose journeys will fall within designated periods. While such fares undoubtedly stimulate travel because they offer a temporary abatement of the going rate, they are feasible

only under conditions which afford the carriers full opportunity in advance to cope with the exceptional temporary volume of travel. It seems clear that a special excursion fare, good for three days, let us say, to Niagara Falls, will afford extra trainloads of passengers. But were this fare permanently to supplant the standard fare to the same destination, it is clear that the extra volume of travel would not be continuous, and that, even if it were, the carrier could not ordinarily render the physical service continuously without impairment of other services which it is bound to afford. For example, a special excursion fare on a holiday may serve to fill coaches which would otherwise stand idle. But the temporary surplus of equipment ceases with the resumption of the ordinary tide of daily travel. The characteristic feature of convention and excursion travel may be found in the time limitations attached and the opportunity such time limitations afford to the carrier to provide the special accommodation necessary.

"The tourist fares and tourist travel are unlike the types previously described in that they are generally seasonal and afford a longer period within which the tourist may elect to travel. It may be said, however, that the travel to which they apply is normally long-distance travel. This, of itself, delimits somewhat sharply the extent to which this service will be demanded. Pullman service is likely to be required by the tourist, and this relieves the carrier by rail-

road to a degree of certain burdens which the exclusive use of ordinary coaches would entail. The reservation of Pullman service by the tourist may also serve as something of advance notice of the time when such tickets must be honored. Furthermore, seasonal forecasts based on past experience allow some considerable knowledge in advance of the probable extent of tourist travel. In other words, the extent to which empty space on through trains for long trips is capable of being partly filled by the offer of tourist rates of fare is also characteristic of this traffic.

"The above-described classes of passenger travel then have fairly well-defined and special characteristics. Commutation service is unique in its large volume, its regularity, and in the delimited area within which it is demanded and supplied. The extra service involved in excursion and convention travel is capable of close calculation in advance, both as to the revenue it is likely to yield and as to the extent to which special physical provision must be made therefor. Tourist travel is seasonal, is generally for long distances, and is also capable of fairly accurate prevision."

The courts and the Commission have long recognized the differences between these various types of special fares and interchangeable mileage or scrip tickets. In particular they have emphasized at great length the very fundamental distinction between commutation rates, where suburbs of a city have grown up in reliance on

them, and all other classes of passenger fares.

The Commission has now actually required the carriers to submit statistics showing their commutation business separately from other passenger traffic. Commutation service is now recognized as a distinct branch of the railroads' transportation business. (See order of Interstate Commerce Commission issued December 31, 1920, requiring the carriers to use Form OS-D in reporting certain statistics. Items 6-01, 7-01, and 8-01 call for number of commutation passengers carried, number of commutation passenger miles (by thousands), and commutation revenue, respectively. Items 6-02, 7-02, and 8-02 call for similar information for all other passengers. See the last column on page 1 of Exhibit 50 herein, Record, p. 160.)

The so-called "additional class of passenger travel" which the Commission felt itself required to provide for in making the order in controversy does not bear any distinguishing characteristics which would warrant its separation from other sorts of passenger travel.

The holders of such tickets may travel at any time, in any direction, on any trains, between any points. There is no predictable season, route, or train in or upon which such tickets may be expected. No preparation can be made for their accommodation. The holders will not move daily in regular volume between known points, as do commuters. Nor between points named in advance at seasons or upon holidays when equipment can be spared from other service, as may be for excursions. Nor between resorts established by custom and availed of by a calculable tide of travel, as does the tourist. The coupon-

ticket holder may enjoy limited trains or way trains, excess-charge trains or ordinary trains. He may, and probably usually will, carry baggage. No human foresight can so provide as to effect any economies from any increased travel stimulated by the sale of the ticket.

If the loss in revenue to the appellees herein from the reduced fare ordered by the Commission is $32,000,000 (see *supra*, p. 62), then at 2.88 cents per mile, the selling price of the proposed ticket, the carriers must perform well over one billion additional passenger miles of service to earn enough revenue merely to make up this loss. These figures represent only the appellees here, and do not show the number of additional passenger miles which must be performed by all of the Class 1 railways throughout the country to offset the losses which they would sustain under the order, nor do they take any account of the additional cost which must necessarily be incurred by the carriers in rendering this large amount of extra service.

The figure of one billion passenger miles, even if we limit ourselves to that figure, conveys little impression to the average mind. Expressed in another way, this figure means that if the average journey of a ticket holder is 50 miles (Exhibit 50 gives 51½ miles as the average journey for passengers other than commuters) 20,000,000 such journeys must be made which would not otherwise be made before the total figure of additional service is reached. Or, expressed in another way, 100,000 persons must make 200 additional journeys of 50 miles each within a year.

These computations give some indication of the

tremendous amount of additional traffic which would be necessary merely to make up the loss to the appellees herein for the actual reduction in fare. They do not allow for the loss of any of the other roads, or for the additional cost of performing this extra service, or of issuing and policing the scrip-coupon tickets.

That this extra travel will result from the tickets to be issued under the order is expressly found by the Commission to be "in the realm of speculation" (Record, p. 28).

As we pointed out above, before the additional traffic, if any, produced by the reduced rate can begin to recompense the carriers for the loss in revenue, it will be necessary that users of the tickets travel 25% more than they would otherwise do for a given expenditure. The additional expense involved in this increase of 25% will then have to be taken care of before the carriers can begin to feel any net increase in revenue.

The brief filed in this court on behalf of the International Federation of Commercial Travelers Organizations as *amicus curiae* attempts, at pages 117 ff., to dispose of this difficulty. It is there suggested that one additional passenger per car over the figures for the first six months of 1922 would more than make up the loss in revenue of all the carriers in the United States. One extra passenger per car does not sound like a very large increase—which seems to be the implication from this argument. Considering, however, that the average number of passengers per car for 1922 was 15, it means an increase of one fifteenth, or approximately 7% of the carriers' total passenger business; or, translated into passenger miles, it means an in-

crease of 2,198,000,000, as appears at page 118 of that brief—over twice the amount on which we based our computations regarding the number of additional journeys.

The brief intimates that the commercial travelers would unobtrusively be absorbed into the present traffic, one passenger to a car without expense, when it suggests that it would be a benefit, instead of an expense to increase the average from 15 to 16 per car. But obviously they will crowd the commercial routes instead of distributing themselves with academic regard for railroad economy, one commercial traveler to a car throughout the country.

If the argument is made that as a general principle a reduced rate would stimulate travel, it does not follow that it would stimulate travel only, or any more, among those who have $72 in their pockets than among the general public. In fact the former in general would be less likely to be affected by rate changes than those who figure their expenses in cents rather than dollars. It cannot be doubted that a general reduction in passenger rates would stimulate travel on the part of the less well-to-do in much greater degree than on the part of professional traveling men and wealthy pleasure seekers. There should be nothing in the possession of $72 which should constitute a class to be set aside and selected for this favor which is denied to the man or woman with only $1. The Commission itself finds that the wholesale principle in the mercantile world involves elements entirely lacking in this new ticket (Record, p. 26). There is no analogy between this ticket and the carload rate (Record, p.

26). The carriers cannot perform the service for coupon-ticket holders on a wholesale basis. The average ride is only about 50 miles. There will be a large number of coupon-ticket riders for short distances, and they will be scattered all over the United States and will not be bunched either as to time, place, route, or train.

In other words, the order requires a wholesale rate to be given for a retail service to a certain selected class, which class is selected merely and solely because they have more money to spare than the general public.

There is no gain to the carrier from having a large amount of transportation bought at one time and getting the use of the money for a short period. The Commission finds that not only is the evidence of this supposed advantage inconclusive, but it is more than offset by the additional expense of accounting and policing the use of the ticket (Record, p. 27).

It was suggested that the commercial travelers form a separate classification of passengers on the ground that their activities tend to create additional freight traffic (Record, p. 25). Apparently this argument did not appeal strongly to the Commission, inasmuch as no reliance is placed upon it as a basis for the Commission's so-called conclusion. If, however, the possible stimulation of freight traffic were found to be a justification for special rates for commercial travelers it would nevertheless fail to justify the classification made in the Commission's proposed order. That order prescribes tickets which may be used by any one, commercial traveler, stimulater of freight or not, who has enough

money to purchase the tickets and who travels far enough in a year to make such purchase worth while.

The order is not an order regulating the rate for a ticket already in use and issued by the carriers of their own volition, for the Commission finds:

> "Carriers have never issued an interchangeable mileage ticket good for use on all railroads in all parts of the country. Mileage tickets were issued good for use over particular lines and were interchangeable as to carriers within defined territories" (Record, p. 24).
>
> "The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles" (Record, p. 28).
>
> "The evidence as to the use of the mileage books is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues" (Record, p. 28).

The brief of the Interstate Commerce Commission suggests, at pages 17 and 18, that the prior existence of interchangeable scrip-coupon tickets issued at the standard rate negatives the argument that the tickets prescribed in the order create a new classification of traffic. This argument completely misses the point. The new clas-

sification is not merely a classification of persons who travel on interchangeable scrip-coupon tickets. It is rather one of persons who have $72 to invest in transportation in advance. There is no similarity whatsoever between the present transferable interchangeable scrip-coupon tickets sold for $15, $30, or $90 at the option of the purchaser, and the suggested tickets sold only at $72 and non-transferable.

There can be but one justification for a reduced rate, and that is a reduced cost. Yet every legitimate inference from the record leads to a conclusion of higher, not lower, cost.

There is no finding by the Commission that a greatly added volume of passenger traffic can be handled with the present equipment of the carriers. On the contrary, it is notorious that equipment is taxed to the limit. The carriers have been so starved for earnings and so adversely affected by strikes that it is common knowledge that equipment is below normal.

There can therefore be no reduction in cost per passenger because of handling a greater volume of traffic. More traffic means more equipment, more power, more cars, more cost.

V.

In the Respect that the Commission's Order is an Arbitrary and Unreasonable Discrimination in Fares between Scrip-Coupon Passengers and Regular-Fare Passengers, it is beyond the Power of the Commission and Lacks Due Process of Law.

It is elementary that the body charged with administering in detail a valid statute may act in

such an arbitrary or unfair manner that the statute through its enforcement may take property without due process of law.

Yick Wo v. *Hopkins,* 118 U.S. 356:

> The administration of a municipal ordinance to regulate the carrying on of a lawful business violates the Fourteenth Amendment if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances.

In—

Tarrance v. *Florida,* 188 U.S. 519, 520—

the law of the state was not challenged, but its administration was complained of. Brewer, J.:

> "Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law."

Dobbins v. *Los Angeles,* 195 U.S. 223, 240 (Day, J.):

> "This court, in the case of *Yick Wo* v. *Hopkins,* 118 U.S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

The Commerce Act requires the Commission to adopt just and reasonable rates after a hearing. It requires these rates under sections 2 and

3 to be free from unjust discrimination and undue and unreasonable preference. It places upon the Commission the duty of establishing rates so that the carriers will earn a fair return upon the value of their property (section 15*a*). It requires the Commission to act upon evidence, and not by guess.

The Commission's order reducing the rate 20% for coupon tickets results in taking the railroads' property without due process of law, because it creates an arbitrary classification of passengers into those who have the desire and the money to buy 2500 miles in advance and those who have not.

If this classification were made by charging less for the coupon tickets and increasing the rate on regular tickets correspondingly, it is possible that the railroads, not being harmed, could not raise this point. The general public, who have no occasion for 2500 miles of transportation at a time or no money to buy so much, would then be the parties whose property would be taken without due process of law. It is not consistent with due process of law under the Fifth Amendment to deny any party the equal protection of the laws guaranteed against state action by the Fourteenth Amendment.

> Fuller, C.J., in *Giozza* v. *Tiernan*, 148 U.S. 657, 662:
>
> "And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

> Harlan, J., in *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 559; quoting Fuller, C.J., in *Duncan* v. *Missouri*, 152 U.S. 377, 382:
>
> "Due process of law and the equal protection of the laws are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of Government."

But as the regular fare, under this order, remains the same, and the scrip-coupon fare is reduced 20%, both the railroads and the general public are hurt—the railroads because they are required to cut their rates, affecting largely people who would travel anyway, on a substantial proportion of their passengers; the general public because, if the railroads can stand a cut in rates, the cut should operate equally on all who use the same service.

The mileage book or scrip-coupon ticket differs essentially from the commutation or excursion ticket.

A group of persons desiring to take a particular journey at a particular time may fairly be classified separately from the general public. So also may all persons "commuting" regularly between the same points.

But it is no reasonable ground for giving a lower rate or other preference to one man that he can afford to pay a substantial sum in advance. This classification is bad because it has no reasonable relation to the subject-matter, which is travel. The man who wants to pay a large sum in advance and travel often uses the

service just like any other traveler. To give him a 20% discount is just as arbitrary as to give the discount to every tenth applicant at the ticket office.

The decision of the Supreme Court in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad, supra,* does not conflict with the principle for which we are contending. That case arose out of a contest which was really a contest between two railroads. The Baltimore & Ohio had for some years been issuing ten-party tickets. Complaint was made by the Pittsburgh, Cincinnati & St. Louis Railroad to the Commission to have such party tickets cancelled, obviously the effort of a competitor to prevent the use of a competitive rate. The court assumed (and this assumption is the justification for the decision) that parties of ten could undoubtedly be carried at lower cost to the carrier than individuals riding on one-way tickets, and held that the sale of such ten-party tickets did not violate the prohibitions of the Commerce Act. The case was decided in 1892 upon a state of facts existing in 1890, only three years after the original Interstate Commerce Act was passed and when the agitation against discrimination had not risen to the height which caused the enactment of the Elkins and Hepburn Acts and produced the most stringent regulations of the Commerce Act against discrimination in every form.

The court in its opinion suggested that the enumerated exemptions in the first paragraph of section 22 were illustrative, and not exclusive. It is to be observed that the provisions of the first paragraph of section 22 are for the benefit

of the carrier and to allow it a reasonable latitude in the establishment of rates of fare when bearing a proper relation to cost of service or possible reduction of expense per passenger mile.

Nothing in the *Baltimore & Ohio* case militates against the principle that the carrier may voluntarily establish rates based upon the sound principle above mentioned if they are not discriminatory, which it could not be *compelled* to put into effect by either the legislature or the Commission. The doctrine of the *Baltimore & Ohio* case cannot be carried further than that, in addition to the exemptions mentioned in the first paragraph of section 22, the carrier may be *permitted* to establish reasonable differences in rates where the class of travel favored has a well-established relation to the cost of handling. It certainly cannot be carried to the extent of either permitting the carrier or authorizing the Commission to establish arbitrary classes of travel at favored rates without respect to cost of handling. Unless this distinction and limitation is carefully observed, the prohibitions against discrimination in the earlier sections of the Act would be rendered innocuous and ineffectual.

We are confirmed in this view because by later decisions it has become well settled, first, that an arbitrary and unjust discrimination is not permitted simply because it results in greater profit to the carrier, and second, that a discrimination is arbitrary and unjust if it bears no relation to the subject-matter of the regulation.

In—

Atchison & Santa Fé Ry. Co. v. *Vosburg,* 238 U.S. 56, 60, 61—

a statute giving attorneys' fees to shippers, but not to railroads, in suits between them, without reference to which party, whether the railroad or the shipper, was plaintiff, was held void because arbitrary, having no relation to the subject-matter, namely, to secure adequate prosecution in court of actions respecting car service. Compare this case with the numerous cases holding in suits against railroads that the defendants may be required to pay the plaintiffs' attorneys' fees. See *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U.S. 325.

In—

Cotting v. *Kansas City Stock Yards Co.*, 183 U.S. 79—

the state argued (p. 103) that it was proper to classify stockyards on the basis of business done because rates may be made lower in a plant where the volume of business is large, while in a smaller plant higher rates may be necessary in order to afford adequate returns; but the court held unanimously that this classification was void. Brewer, J. (p. 104):

> "Clearly the classification is based solely on the amount of business done and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad com-

pany hauling a hundred or more passengers a day to charge only a specified amount per mile for each, leaving those hauling ninety-nine or less to make any charge which would be reasonable for the service; or (if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts), one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or, forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down. . . .

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based

upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

See also *Gulf, C. & S.F. Ry. Co.* v. *Ellis,* 165 U.S. 150, 155.

Southern Ry. Co. v. *Greene,* 216 U.S. 400, 417 (Day, J.):

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Selling mileage transportation, which costs the same *per capita* as ordinary transportation, at a cheaper rate *per capita,* is indefensible in theory, because the basis of the discrimination is not the service rendered but the capacity of the traveler to buy. The opinion of the Commission would justify a life-insurance company in selling a $100,000 life policy at a much cheaper rate per thousand than a $1000 policy, the other elements being the same, because it is a large sale and may be

made very profitable for the company through reducing the expenses per thousand and stimulating the purchase of large policies. Yet it is universally conceded that such a practice would violate the anti-discrimination laws.

In—

Providence Coal Cases, 1 I.C.C. 107—

the Commission ruled that lower rates to wholesale shippers violated the Commerce Act.

In—

Matter of Passenger Tariffs, 2 I.C.C. 649—

a decision of the Interstate Commerce Commission prior to the *Baltimore & Ohio Railroad* case, the Commission expressed the opinion that party rates lower than the regular rates for single passengers were an illegal discrimination.

The principle of the mileage book or scrip-coupon ticket at a lower rate has been condemned as an arbitrary and unjust discrimination in the following decisions:

In re Mileage Books, 28 I.C.C. 318, 323:

> "If it were not for the provision of Section 22 of the Act to regulate commerce, that nothing in the Act shall prevent the issuance of mileage tickets, it is debatable whether the concession from the regular fare made to the purchasers of mileage books would be lawful. While that question is foreclosed by the provision in Section 22, the very fact that the mileage book owes its existence to

a special permission of the statute is significant. *Escher* vs. *P. R. R. Co.*, 18 I. C. C. 60."

Proposed Increases in New England, 49 I.C.C. 421, 444:

"The fundamental evil in the sale of mileage books, at least in New England, is that they accord preferential fares to those who use them. In northern New England, for example, a man with sufficient capital to buy a mileage book, may ride 100 miles for $2.25. A less fortunate individual riding between the same points in the same train and on the same car, must pay $3 for the same service. Witness after witness testifying for the carriers, when asked upon what theory such discrimination could be justified, replied that it could not be justified on any principle. It is clear that the mileage book evil in New England must be eliminated, either by canceling the mileage fares entirely or by increasing them more nearly to the basis of regular one-way tickets. If travelers want mileage tickets as a convenience and not as a discrimination, there is no great objection to permitting their sale."

The leading case is—

Lake Shore & Michigan Southern Ry. Co. v. *Smith*, 173 U.S. 684:

A Michigan statute required that each railroad company in the state should sell one thousand-mile tickets at a price not exceeding $20

in the Lower Peninsula and $25 in the Upper Peninsula; that such tickets might be non-transferable, but whenever required by the purchaser they must be issued in the names of the purchaser, his wife, and children; and that each ticket should be valid for two years only after date of purchase. The court held (Chief Justice Fuller, Gray, J., and McKenna, J., dissenting) that the statute was void as a taking of property without due process of law. Peckham, J. (p. 690):

> "The question is presented in this case whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.
>
> "It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other

cases. It is asserted also that this is only a proper and reasonable regulation.

"It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. . . .

"The power of the legislature to enact

general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public. . . .

"If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if

enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

"But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie,* the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

"There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed

them affords a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates. . . .

"The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and

therefore to part with its property without due process of law. . . .

"It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company. . . .

"In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not

legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason."

In—

Beardsley v. *N.Y., L.E. & W. R.R.*, 162 N.Y. 230—

a state law was held unconstitutional, on the authority of the *Smith* case, requiring each railroad to issue a mileage book entitling the holder to travel one thousand miles on its own lines.

In—

Commonwealth v. *Atlantic Coast Line R.R.*, 106 Va. 61; 55 S.E. 572—

the court made a similar decision.

A similar case, following the above three cases and relying upon them, is—

State v. *Great Northern Ry.*, 17 N.D. 370; 116 N.W. 89.

In—

State v. *Bonneval* (La.), 55 So. 569—

the validity of a state statute providing that all members of a family should be entitled to the benefit of a mileage ticket as though each were the original purchaser was questioned. The maximum rate of fare was 3 cents. The railroad had

for many years, however, issued mileage books at the reduced price of 2½ cents, making the book non-transferable. The court held, on the authority of the *Smith* case, that the legislature could not order the issuance of mileage tickets or prescribe who should be the beneficiaries thereof, and hence the statute was invalid.

The following cases, which distinguish the *Smith* case on their particular facts, without exception recognize the soundness of its doctrine:

Railroad Commissioners of Ga. v. *L. & N. R.R. Co.* (Ga.), 80 S.E. 327:

In this case the Georgia Railroad Commissioners ordered the railroads selling mileage or scrip books to tear off the coupons upon the trains instead of requiring the coupons to be exchanged for tickets. The railroad brought suit to enjoin the order on the ground that the issuance of the tickets at less than the maximum rates of fare could not be compelled, and that therefore the railroad had a right to make a contract as to the terms under which the tickets could be used. The court held that it was settled that, where a state had fixed a reasonable maxmum rate, it could not compel railroads to sell mileage tickets at a less rate, and further that, where a railroad had voluntarily issued tickets of this character, the decision in the *Smith* case did not go to the length of denying the state the power to regulate the manner of using such tickets.

State v. *Maine Central R.R. Co.*, 77 N.H. 425:

In this case the New Hampshire law requiring the sale of mileage books at 2 cents per mile was

held valid. The *Smith* case was held not to be applicable, because it was not alleged in the New Hampshire case that the legislature had fixed any maximum rate which should be considered as just and reasonable. The only question raised was as to the sufficiency of the fare, it being contended that the statute was confiscatory. The case is not against our position. The statute did not discriminate. It provided an intrastate mileage book at 2 cents per mile, that being the only intrastate rate fixed in New Hampshire. So in the instant case, if the Commission had ordered these tickets issued at the standard rate, the carriers would not have this cause of complaint.

Purdy v. *Erie R.R. Co.*, 162 N.Y. 42:

This case, which arose about the same time as the case of *Beardsley* v. *N.Y., L.E. & W.* (*supra*), held that, as applied to a railroad chartered after the passage of the New York statute requiring the issuance of mileage tickets, the statute was constitutional and operative, inasmuch as the corporation must be taken to have accepted its charter on the condition that such tickets might be required of it. After differentiating the *Beardsley* case and recognizing the force of the *Smith* case, the court said:

> "We know of no reason, however, why a railroad company may not agree, upon sufficient consideration, to surrender or transfer any specific pecuniary right" (p. 48).

Horton v. *Erie R.R. Co.*, 72 N.Y.S. 1018:

This case expressly follows the *Purdy* case, upholding the constitutionality of the New York

statute "in so far as it relates to railroad corporations thereafter incorporated in this State."

Minor v. *Erie R.R. Co.*, 171 N.Y. 566:

This case, which was exactly like both the *Purdy* and *Horton* cases, was decided on the same ground.

Duluth St. Ry. Co. v. *Ry. Com. of Wis.*, 152 N.W. 887, 894, 895:

In this case the court upheld the State Commission in requiring that the street-railway company issue six tickets for 25 cents, the single fare being 5 cents. The court expressly recognized the doctrine of the *Smith* case, and differentiated it on two grounds, the first being that it was carrying the doctrine of discrimination to a ridiculous limit to say that any discrimination was involved in requiring persons who desired to purchase only a single ride to pay 5 cents while others, who were able and willing to invest 25 cents, received six rides therefor. In other words, "*de minimis non curat lex.*" (So much of this case as deals with this point is referred to in the brief for the International Federation of Commercial Travelers Organizations at page 67. That brief, however, does not mention the court's second point.) The court then proceeds:

> "There is another and perhaps a better reason why the doctrine of the case above cited [*Smith* case] does not apply. The smallest fractional currency we have is one cent. A reduction in the rate of fare from 5 cents to 4 cents amounts to 20 per cent and is a large reduction. It is not the law that a railroad commission, or the legislature for

that matter, cannot reduce a rate of fare from 5 cents unless it reduces it to 4, 3, 2, or 1 cent. Here the Commission evidently determined that a charge of 4-1/6 cents per passenger was as low as the rate should go. There is no way that such a rate could be put into effect without requiring the passenger to buy at least six tickets. Everyone has a like privilege. The amount of investment here required in the first instance is too small to constitute a discrimination, and in the next place it is necessary that a bunch of tickets be sold, such as was here determined upon, in order to fix what is really a reasonable rate of fare."

The above are all the cases that we have been able, after exhaustive research, to discover which deal directly with mileage or scrip-coupon tickets. Counsel for the International Federation of Commercial Travelers Organizations, in their brief filed as *amicus curiae*, refer to no others. There are, however, several important cases which, while they do not deal with mileage tickets, bear directly upon the point at issue and involve the same principles as those applied in the cases just cited. These cases will be discussed at this point:

Chicago, R.I. & P. Ry. Co. v. *Ketchum*, 212 Fed. 986:

This was a bill in equity by the railroad against the Iowa Railroad Commissioners to restrain an order compelling the railroads to grant excursion rates to all persons traveling to the City of Des Moines during the continuance of the State Fair. The District Court, three judges sitting,

held that the rates fixed by the general statute are presumably just and reasonable, and that the legislature, having prescribed such rates, had no power to make exceptions thereto in favor of a particular class of passengers or a particular locality. Conceding that the state might compel the railroads to grant excursion rates to persons attending the State Fair on the ground that it is an educational institution, the compulsory extension of such rates to all passengers for Des Moines during the continuance of the Fair was unconstitutional as an arbitrary discrimination depriving the railroads of their property without due process of law. The court considered at length the subject of commutation, party, mileage, and excursion tickets. After discussing the *Smith* case the court said (pp. 998-999):

> "We find nothing in the later decisions of the Supreme Court which indicates a purpose to dissent from the principles therein announced. It must therefore be accepted by us as settled that the legislature cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons as the legislative judgment may deem proper. . . . When maximum rates have been declared they are presumed to be reasonable and the legislature is presumed to have fixed such rates upon a reasonable basis after due investigation and consideration. It may not then depart from them in sporadic instances. It may not tell the company to charge smaller rates for conventions, church or political, or for other excursions, at least unless it be strictly limited to those attending the meeting

which is deemed educational. The power when exercised must affect directly, peculiarly and exclusively the public interest which may properly be promoted. . . .

"We recognize the rule that a temporary injunction against the enforcement of an act of the state Legislature fixing rates is seldom granted until after a trial of the rates if there is a bona fide resistance made by the state and there exists any doubt whatever as to the facts, but the question here involved is much broader than that embraced in such cases. Here it is not a question of whether the particular rate will be confiscatory or not. There is no conceivable chance of profit to the railroad company which would make this law valid. The court could not be further enlightened by additional disclosures of material evidence. On the other hand, the injury flowing from the unwarranted order would be accomplished and irreparable."

In—

Northern Pacific Ry. Co. v. *North Dakota,* 236 U.S. 585—

involving the intrastate rates on coal in carload lots fixed by the statute of North Dakota, the Supreme Court held that the state has no right to segregate a commodity or a class of traffic and compel the carrier to transport it at a loss or without substantial compensation. These rates, fixed by the statute, were held unreasonable, requiring the carrier to transport the commodity either at a loss or for a merely nominal compensation, after taking into account the entire traffic

to which the rates applied, and therefore deprived the railroads of due process of law. Hughes, J. (p. 595):

> "As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & Michigan Southern Ry.* v. *Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the State's protective power. . . .
>
> "The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing

the burden of the upkeep of the property upon coal and other commodities. . . .

"The State insists that the enactment of the statute may be justified as 'a declaration of public policy'. In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others

might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable. The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. . . .

"But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. . . . It has repeatedly been assumed in the decisions of this court, that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward."

Justice Hughes, after discussing *Atlantic Coast Line R.R.* v. *North Carolina Corporation Commission*, 206 U.S. 1, involving the validity of an order requiring the railroad company so to arrange its schedule of transportation between two points as to make connections with through trains, quoted from that decision as follows (pp. 602-603):

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

Resuming the opinion of the court in *Northern Pacific Ry.* v. *North Dakota,* Justice Hughes said (p. 604):

> "To repeat and conclude: It is presumed, —but the presumption is a rebuttable one— that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it

must be concluded that the State has exceeded its authority."

Northern Pac. Ry. Co. v. *North Dakota,* 236 U.S. 585, is affirmed in—

Vandalia R.R. v. *Schnull,* 255 U.S. 113, 119, 120—

particularly the language:

"that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward."

This principle was applied to passenger traffic in—

Norfolk & W. Ry. v. *West Virginia,* 236 U.S. 605, 608, 609—

holding that no department of the carrier's business could be selected by the State Commission for arbitrary control.

In—

Chicago, Milwaukee & St. Paul R.R. v. *Wisconsin,* 238 U.S. 491—

a Wisconsin statute prohibiting the railroad from letting down an upper berth not taken when the lower berth was occupied was held unconstitutional, reversing the state court, which upheld the statute on the ground that it contributed to the comfort and convenience of the traveling public and incidentally to their health and general welfare. The Supreme Court held (McKenna, J., and Holmes, J., dissenting) that the state cannot compel the railroad to give the occupant of the

lower berth the free use of the upper berth while it is not actually purchased by another passenger. The opinion cites the *Smith* case upon the point that (p. 499)—

> "keeping the upper closed will not add to the comfort of the public generally."

The ground upon which the statute was bad was that it discriminated in favor of the passenger who happened to have no passenger above him, giving him twice the space for the same money.

In—

Wisconsin, Minnesota & Pacific R.R. Co. v. *Jacobson*, 179 U.S. 287—

an order enforcing track connections was sustained. The court said that the distinction between this case and the *Smith* case is plain. Peckham, J. (p. 301):

> "There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of who in the legislative judgment should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation

could be rested, unless the simple decision of the legislature should be held to constitute such reason."

In—

Commonwealth v. *Interstate Street Ry.*, 187 Mass. 436—

involving the validity of a statute requiring school children to be carried for half fare, the question was whether there is constitutional justification for discriminating between pupils of the public schools and other persons. The court said (Knowlton, C.J., p. 438):

"If this were an absolute and arbitrary selection of a class independently of good reasons for making a distinction, the provision would be unconstitutional and void. . . . The subject of compelling a railroad company to make an exception as to its rates in favor of a certain class of persons was considered elaborately in *Lake Shore & Michigan Southern Railway* v. *Smith*, 173 U. S. 684, and it was held that ordinarily the legislature has not power to compel such action. The subject is also referred to in *Wisconsin, Minnesota & Pacific Railroad* v. *Jacobson*, 179 U. S. 287, 301. . . .

"If therefore it plainly appeared that the enforcement of this section would cause expense to street railway corporations which they must bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of

> property without due process of law through unconstitutional discrimination."

The decision was that, since the selection of the favored class was not arbitrary, but was in aid of the education of children, a subject for legislation which has occupied the law-makers from early times, and which is within the police power of the state, and since the evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half rates, the statute was valid.

> "We hesitate to say that our law-makers could not pass the act as one which would put no financial burden upon anybody" (p. 440).

Upon writ of error the Supreme Court of the United States affirmed the decision upon grounds which indicate that an order compelling the issuance of mileage books at a reduced rate would have been held void.

Interstate Ry. Co. v. *Massachusetts,* 207 U.S. 79:

A majority of the court considered that the case was disposed of by the fact that the statute was in force when the street railway took its charter, and confined itself to that ground. Holmes, J., writing the opinion and speaking for himself alone, observed that the position of the majority was sufficiently doubtful to make it unsafe not to discuss the validity of the regulation apart from the supposition that the street railway had accepted it. Page 86:

> "The objection that seems to me, as it

seemed to the court below, most serious is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of five cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute fairly construed means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage, if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations, *Minneapolis & St. Louis R.R. Co.* v. *Minnesota,* 186 U. S. 256, 267, it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, 24, 25.

"Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. . . .

> "Education is one of the purposes for which what is called the police power may be exercised. *Barbier* v. *Connolly,* 113 U. S. 27, 31. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, *or people who could afford to buy 1000-mile tickets"* (italics ours).

In—

Pennsylvania R.R. Co. v. *Towers,* 245 U.S. 6—

the order of the state commission fixing reasonable rates for commutation tickets was upheld in view of the distinction between commutation tickets and mileage tickets. As we have above shown, commutation tickets do not operate as an arbitrary classification, because the distinction is based upon a reasonable distinction in the service (see pp. 33, 70, *infra*). The railroad, however, attempted to bring the case within the *Smith* case. The court properly distinguished the *Smith* case on the ground (p. 10)—

> "that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution by depriving the rail-

road company of its property without due process of law and denying to it the equal protection of the law. The *Lake Shore* case did not involve as does the present one the power of a State Commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. . . .

"That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the State the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets *to passengers who have a peculiar relation to the service* [italics ours]. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling

single tickets for single journeys to one-way passengers.

"The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger."

The distinction between commutation tickets and mileage tickets is further emphasized by the Supreme Court, quoting from the opinion of the Interstate Commerce Commission in the—

Commutation Rate Case, 21 I.C.C. 428:

"Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission, and is the view generally entertained, although there may be exceptional circumstances where a dif-

ferent conclusion would be required. It by no means follows, however, that a carrier under Section 22 may exercise the same scope and freedom of action with respect to commutation tickets."

This case, *Pennsylvania R.R. Co.* v. *Towers*, does not shake the authority of the *Smith* case except in the following respect (p. 17):

> "The views therein expressed which are inconsistent with the right of the states to fix reasonable *commutation* fares *when the carrier has itself established fares for such service*, must be regarded as overruled by the decision in this case." (Italics ours.)

It should be noted that even as to the right of the Pennsylvania Commission to require the continuance of commutation rates Chief Justice White, McKenna, J., and McReynolds, J., dissented.

In—

Arkadelphia Co. v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134—

after bills in equity to restrain freight rates had been dismissed, reversing the court below, which had granted injunctions, the cases were sent to a master for the purpose of determining the damages against the railroads sustained by the granting of the injunctions. The questions dealt with refunds of overcharges. The railroads excepted to an allowance in favor of the Arkadelphia Company on the ground that the "rough material rates were discriminatory against shippers who did not reship the specified percent-

ages of the finished product." The rough material rates were a part of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court said (p. 149):

> "But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. . . .
>
> "*Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended."

The *Arkadelphia* case is no authority against our contention. When the entire schedule of rates had been sustained as not confiscatory, and hence not denying the railroads due process of law, of course a railroad could not raise the point that a particular class of shippers was discriminated against and was denied the equal protection of the laws. That is a question which the shipper who was hurt must raise.

To make the case at bar parallel with the *Arkadelphia* case we would first have to have a decision that the whole schedule of passenger rates, including the interchangeable mileage rates, is valid; in brief, that what the railroad loses on the mileage rates it makes up on other fares. If that were once decided, the people who were hurt by reducing the rate to commercial travelers and increasing it to ministers of religion, for example, would have to raise the point. But when the carriers themselves are harmed by an arbitrary classification which reduces the fares for the commercial travelers while not raising them against other members of the public, this result, as held in the *Smith* case, deprives the carriers of due process of law.

We emphasize again the language last above quoted from the *Arkadelphia* case, referring to the *Smith* case: "The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation." In other words, the railroad in the *Smith* case was not permitted to show discrimination against individuals for the purpose of withholding relief by way of damages from

those individuals, but rather in order to show that the rates, being discriminatory, were unreasonable, and therefore could not be forced upon the railroad. It is not the law that a railroad can charge, or be compelled to charge, unreasonable or discriminatory rates *until* or *unless* some one who is injured thereby complains. The statute prohibits unreasonable or discriminatory rates, and therefore neither the railroads nor the Commission is at liberty to put them into effect. In particular, the Commission has no power to require unlawful rates to be charged by the railroads. This point is so obvious as scarcely to need the citation of authority. We refer again briefly, however, to the *Tennessee* case (*Nashville &c. R.R.* v. *Tennessee*, 262 U.S. 318), in which this court said, at page 323:

> "A lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee Commission was expressly found by the Interstate Commerce Commission."

It is to be noted that it was the railroads, and not the quarries "within or without the State" of Tennessee, which complained to the Interstate Commerce Commission of the Tennessee Commission's order. Furthermore, the point under discussion was expressly called to the attention of this court by counsel for the Tennessee Commission, who, in their brief before this court on a motion for supersedeas, at page 16, stated that—

"The persons and localities injuriously affected were not the complainants in the proceeding before the Interstate Commerce Commission in which the order was made. . . . Statutory authority for a proceeding before the Interstate Commerce Commission at the complaint of carriers concerned, resulting in an order removing a discriminatory rate because injuriously affecting persons other than the carriers who instituted the proceedings, is wholly foreign to the principles of a court of equity, which confines its processes to relief of complainants injuriously affected by the subject matter against which the process of the court is invoked."

In *New York* v. *United States*, 257 U.S. 591, the court, at pp. 599 and 600, discussed the question of whether the Commission's order under attack was based upon sufficient evidence of discrimination against persons and localities. The railroads had applied to the Interstate Commerce Commission for an order directing them to put intrastate passenger (and certain other) fares on the same level as interstate fares. They had introduced evidence showing, *inter alia*, discrimination against passengers in interstate travel. But no such passengers had joined in the complaint (*Rates, Fares and Charges of New York Central Railroad Co.*, 59 I.C.C. 290, 302). The Commission had granted their petition. This court found that the evidence of discrimination against persons or localities was not sufficient to sustain the order, but upheld it on the ground of discrimination against interstate commerce as such. But the fact that the court considered the matter of

discrimination against persons not complainants indicates that the railroads were not precluded from raising the question (see also *Wis. Ry. Com.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, 579, 580).

We call attention to sections 13 and 15 of the Interstate Commerce Act. The first of these sections provides for complaints before the Commission, either brought by parties interested or by the Commission on its own motion.

> "And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant" (24 Stat. L. 379).

Section 15 gives the Commission power, upon any complaint made as provided in section 13, or after investigation and hearing on its own initiative, to fix rates for the future wherever it decides that there is a violation of the provisions of the Act prohibiting unjust, unreasonable, unjustly discriminatory or unduly preferential or prejudicial rates, etc.

The Commission is also authorized by the Act to award damages to an individual complainant who is injured by any violation of the Act. In such a case obviously the complainant cannot be awarded damages unless he can show himself

to have been injured. Even in a reparations case, however, the Commission is empowered to correct the violation of the Act, not merely for the benefit of the actual complainant, but for the benefit of every one else who has been or may be injured, whether or not a party to the proceeding. As this court has said in—

> *Texas & Pacific Ry.* v. *Abilene Co.*, 204 U.S. 426, 446:
>
> "When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all."
>
> See also *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, 665, 666.

VI.

THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE COMMISSION WITHOUT FIXING ANY STANDARD TO GUIDE THE COMMISSION'S ACTION.

The statute permits the Commission to exempt carriers in whole or in part "where the particular circumstances shown to the Commission shall justify such exemption to be made." There is no word in the statute to furnish to the Commission any rule or guide to indicate to them under what conditions and circumstances the

power to exempt shall be exercised. The Supreme Court has often said that, where legislative power is delegated to an administrative tribunal, there must be standards provided to guide the action of the tribunal. In—

Wichita R. & L. Co. v. *Public Utility Commission of Kansas*, 260 U.S. 48—

the court said (p. 59):

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

In—

Yick Wo v. *Hopkins*, 118 U.S. 356—

the Supreme Court held invalid a city ordinance which did not provide any standard under which an administrative officer should determine applications for licenses to carry on business. The court, on page 368, stated that the ordinance divided owners of wooden laundries into two classes—

> "not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure."

This ordinance is expressly differentiated from one where discretion is given to a public officer to grant licenses on the basis of the fitness of applicants. In other words, such power cannot be exercised by an administrative official or body unless the statute granting the power prescribes a standard for its exercise.

The amendment of August 18, 1922, does not prescribe such a standard. Therefore it is an unconstitutional delegation of legislative power.

We respectfully submit that the lower court was right in permanently enjoining the enforcement of the order, and that its decree should be affirmed.

Respectfully submitted,

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APPENDIX A.

BILLS INTRODUCED INTO CONGRESS PROVIDING FOR INTERCHANGEABLE TICKETS AT REDUCED RATES:

67th Congress, 1st Session.

S. 331.

In the Senate of the United States.

April 12, 1921.

Mr. McKellar introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued to commercial travelers at a reduced rate by all railroad companies carrying passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized, directed, and empowered to fix and establish on all passenger-carrying railroads a system of mileage books for the use of commercial travelers on all passenger-carrying railroads at a rate of 20 per centum less than the regular passenger-fare rates already fixed.

67th Congress, 1st Session.

S. 819.

In the Senate of the United States.

April 13 (calendar day, April 15), 1921.

Mr. McKellar introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued to commercial travelers at a reduced rate by all railroad companies carrying passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized, empowered, and directed to fix and establish on all passenger-carrying railroads a system of interchangeable mileage books of one thousand and two thousand miles each for the use of commercial travelers, to be sold them by the railroad companies at a rate of 20 per centum less than the regular passenger-fare rates.

67th Congress, 1st Session.

S. 848.

In the Senate of the United States.

April 13 (calendar day, April 16), 1921.

Mr. Watson of Indiana introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill to amend section 22 of the Interstate Commerce Act by permitting the issuance of interchangeable mileage tickets on railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act is amended by inserting "(1)" after the section number at the beginning of such section and by striking out

all after the first proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States subject to this Act, shall issue interchangeable nontransferable five thousand-mile tickets (including the privilege of carrying baggage free to the amount of pounds), to be sold at the rate of 2½ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier, without regard as to whether the points of origin and destination for any single journey are within the same State. The commission, by order, (a) may initiate and establish such classifications, regulations, and practices relating to such tickets, (b) may make such regulation as it deems necessary for the enforcement of the provisions of this paragraph, and (c) shall modify the rate established by this paragraph, whenever in its opinion there is, after this paragraph takes effect, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification, may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any such five thousand-

mile ticket than that required by the provisions of this paragraph or any order of the commission issued thereunder; or refuse to accept any such ticket, for the transportation of persons as provided in this paragraph.

"(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held invalid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstance shall not be affected thereby."

67th Congress, 1st Session.

S. 1085.

In the Senate of the United States.

April 25, 1921.

Mr. Lenroot introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued at a reduced rate by all railroad companies engaged in interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized and directed to fix and establish on all passenger-carrying railroads engaged in interstate commerce a system of interchangeable mileage books of two thousand and five thousand miles each which shall be sold by said railroad companies at a rate of 20 per centum less than the established passenger-fare rates.

The Interstate Commerce Commission is further authorized to make all regulations necessary to insure that each railroad upon which such mileage books are used shall receive its proper share of the money paid for the same.

67th Congress, 1st Session.

S. 1167.

In the Senate of the United States.

April 25 (calendar day, April 26), 1921.

Mr. Spencer introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to issue mileage books of not less than one thousand miles and at a reduction of 20 per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates as now or hereafter in force shall provide for the issuance of mileage books of not less than one thousand miles and at a reduction of 20 per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

S. 1318.

In the Senate of the United States.

April 28, 1921.

Mr. Spencer introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to issue interchangeable mileage books of not less than one thousand nor more than five thousand miles, and at a reduction of 33 1/3 per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates, as now or hereinafter in force, shall provide for the issuance of interchangeable mileage books of not less than one thousand nor more than five thousand miles, and at a reduction of 33 1/3 per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

S. 1374.

In the Senate of the United States.

April 28 (calendar day, April 30), 1921.

Mr. Harris introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate

Commerce Commission to provide for the granting of reduced passenger rates by all railroad companies doing an interstate business through the sale of interchangeable mileage books of not less than one thousand miles.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission is authorized and directed to provide for a system of interchangeable books of not less than one thousand miles each and to direct their sale to the public at a rate of 33 1/3 per centum less than the regular passenger-fare rates by all railroads operating an interstate passenger service.

67th Congress, 1st Session.

S. 1447.

In the Senate of the United States.

May 2, 1921.

Mr. Robinson introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill to direct railroads engaged in interstate commerce to issue mileage books.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act passengers traveling on railroads engaged in interstate commerce shall have the privilege of purchasing and using in payment of their transportation mileage books which shall be issued under rules and regulations prescribed by the Interstate Commerce

Commission. Said mileage books shall be interchangeable, shall contain transportation in the aggregate of not less than one thousand miles, and shall be sold at the rate of 2 1/2 cents per mile. The Interstate Commerce Commission shall have the power to make reasonable rules and regulations for carrying into effect this Act.

67th Congress, 1st Session.

H. R. 2894.

In the House of Representatives.

April 13, 1921.

Mr. Kahn introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act is amended by inserting "(1)" after the section number at the beginning of such section and by striking out the second proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue interchangeable nontransferable five-thousand-mile tickets (including the privilege of carrying baggage free to the amount of ——pounds), to be sold at the rate of 2½ cents

a mile, for transportation of persons on any lines of such carrier or any other such carrier, without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (a) may initiate and establish such classifications, regulations, and practices relating to such tickets, (b) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph, and (c) shall modify the rate established by this paragraph, whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification, may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall demand, collect, or receive greater or less compensation for the transportation of persons or baggage under such five-thousand-mile ticket than that required by the provisions of this paragraph or any order of the commission issued thereunder; or refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

"(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held invalid, the validity of the remainder of such paragraph and the application

of such provision to other persons and circumstance shall not be affected thereby."

67th Congress, 1st Session.

H. R. 5037.

In the House of Representatives.

April 25, 1921.

Mr. Barkley introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued at a reduced rate by all railroad companies carrying passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized, empowered, and directed to fix and establish on all passenger-carrying railroads a system of interchangeable mileage books of one thousand, two thousand, and five thousand miles each to be sold by the railroad companies at a rate of 33 1/3 per centum less than the regular passenger-fare rates.

67th Congress, 1st Session.

H. R. 5362.

In the House of Representatives.

April 27, 1921.

Mr. Flood introduced the following bill; which was referred to the Committee on Interstate

and Foreign Commerce and ordered to be printed.

A bill authorizing and directing the Interstate Commerce Commission to issue mileage books of not less than one thousand miles and at a reduction of 33 1/3 per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates as now or hereafter in force shall provide for the issuance of interchangeable mileage books of not less than one thousand miles and at a reduction of 33 1/3 per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

H. R. 6744.

In the House of Representatives.

June 1, 1921.

Mr. Jacoway introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend for the period of one year section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the period of one year section 22 of the Interstate Commerce

Act is amended by inserting "(1)" after the section number at the beginning of such section, and by striking out the second proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue for the period of one year interchangeable nontransferable two thousand mile tickets (including the privilege of carrying baggage free to the amount of one hundred and twenty-five pounds), to be sold at the rate of 2½ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (1) may initiate and establish such classification, regulations, and practices relating to such tickets; (2) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph; and (3) shall modify the rate established by this paragraph whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification may be redeemed at the same rate per mile as that for

which it was purchased. No common carrier shall (a) demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any such two thousand mile tickets than that required by the provisions of this paragraph or any order of the commission issued thereunder, or (b) refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

"(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held valid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstance shall not be affected thereby."

67th Congress, 1st Session.

H. R. 6780.

In the House of Representatives.

June 2, 1921.

Mr. Jacoway introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend for the period of one year section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the period of one year section 22 of the Interstate Commerce Act is amended by inserting "(1)" after the section number at the beginning of such section, and by striking out the second proviso of such

section and inserting at the end of such section two new paragraphs, to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue for the period of one year interchangeable nontransferable two-thousand-mile tickets (including the privilege of carrying baggage free to the amount of one hundred and fifty pounds), to be sold at the rate of 2½ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (1) may initiate and establish such classification, regulations, and practices relating to such tickets; (2) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph; and (3) shall modify the rate established by this paragraph whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall (a) demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any

such two-thousand-mile tickets than that required by the provisions of this paragraph or any order of the commission issued thereunder, or (b) refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

"(3) If any provision of paragraph (2) or the application thereof to any person or circumstances is held invalid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstances shall not be affected thereby."

67th Congress, 2d Session.

H. R. 11686.

In the House of Representatives.

May 16, 1922.

Mr. Reece introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to direct railroads engaged in interstate commerce to issue mileage books.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act passengers traveling on railroads engaged in interstate commerce shall have the privilege of purchasing and using in payment of their transportation mileage books which shall be issued under rules and regulations prescribed by the Interstate Commerce Commission. Said mileage books shall be interchangeable, shall contain transportation

in the aggregate of not less than one thousand miles, and shall be sold at the rate of 2½ cents per mile. The Interstate Commerce Commission shall have the power to make reasonable rules and regulations for carrying into effect this Act.

APPENDIX B.

Legislative History of the Amendment to Section 22.

Fourteen bills, as is shown by Appendix A herein, were introduced into Congress between April and June, 1921 (with the exception of one introduced in May, 1922). These bills were all referred to the respective Committees on Interstate Commerce (see Appendix A).

On December 22, 1921, the Senate Committee was discharged from further consideration of the bill (S. 848) which it was then considering (Congressional Record, vol. 62, p. 159).

On January 11, 1922, the Senate took up the consideration of this bill.

On January 18th Senator Cummins introduced an amendment requiring the issuance of interchangeable mileage tickets "at a just and reasonable rate per mile," instead of at 2½ cents per mile as in S. 848 (Congressional Record, vol. 62, p. 1516). Senator Cummins addressed the Senate at length on January 18th and 19th on his proposed amendment, his remarks, some of which we quote below, appearing at length at pages 1577 to 1588 of the Congressional Record. He also had printed into the Record, at page 1587, a letter written to him by the Interstate Commerce Commission.

Senator Cummins' amendment was adopted by the Senate on January 21, 1922 (Congressional Record, vol. 62, p. 1690). As so amended, the bill was passed by the Senate on the same day (*ibid*).

The Senate bill then went to the House, where on January 23d it was referred to the Committee

on Interstate and Foreign Commerce (Congressional Record, vol. 62, p. 1812). It was reported out of the Committee with amendments on June 13, 1922 (Congressional Record, vol. 62, p. 9467).

On June 29th it was amended by the House by inserting the words "or scrip coupon" after the word "mileage," by striking out the word "interstate" (which had limited the application of tickets to interstate commerce), and by adding the provision permitting the Interstate Commerce Commission to exempt certain carriers (Congressional Record, vol. 62, pp. 10,460-10,462). As so amended it was passed by the House on the same day (p. 10,462).

The House amendments were all accepted by the Senate on July 1, 1922 (Congressional Record, vol. 62, p. 10,649). The bill became law on August 18, 1922.

As above stated, the bill, as originally presented to the Senate, required mileage books to be used and sold at a rate of 2½ cents per mile. It was in effect conceded that such a bill could not be constitutionally enacted. *L.S. & M.S. Ry. Co.* v. *Smith,* 173 U.S. 684 (pp. 1578-1579). And a number of amendments to the bill were under consideration and discussion, one of which was designed to invest the Interstate Commerce Commission with authority and jurisdiction to determine the just and reasonable rate at which such mileage or scrip books should and could be issued and sold. In the course of the debate in the Senate on January 18, 1922, Senator Cummins, author of the proposed amendments, at page 1577 of the Congressional Record, said:—

"I think I ought to say another word, in a preliminary way, so that my position with regard to the general subject may not be misunderstood. I believe in the system of mileage books or tickets; I believe that form of transportation with respect to a great many people is exceedingly convenient. I think that the practice of issuing mileage books in this country ought to be resumed, and I have no doubt whatever that the Interstate Commerce Commission, when vested with the power, which it has not now, in my opinion, to require railroad companies to issue interchangeable mileage books, will speedily make the necessary order.

"The question, however, with regard to the difference which shall be established between the ordinary ticket and the mileage book is a question upon which we are not qualified to express a judgment. While the Senator from Arkansas has paid me a very great compliment, which I deeply appreciate, I want to say in all candor that even though I have studied this subject for many years it would be utterly impossible for me, with the information I have, to determine what should be the difference, if any, between the ordinary ticket for a specific journey and the mileage book good for any journey."

And further, on page 1578:

"It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the

commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time."

And again, on page 1579:

"Mr. President, I believe that the Interstate Commerce Commission, in accordance with the principle of this opinion, after it makes the proper investigation, and after it determines that the cost of the service, if it so finds, is less in the case of mileage tickets than in the case of specific tickets, can make a reasonable, fair reduction in passenger fares in behalf of those who use mileage tickets; but it must not be an arbitrary reduction. It must be based upon sound, economic reasons. . . .

"In this case if the commission, after its investigation, finds that the railroads can afford, by reason of lessened cost, to sell 5,000-mile tickets or 2,000-mile tickets, I believe it has, or would have if my amend-

ment were passed, the authority to require the railroads to issue those tickets; but an act simply declaring that every railroad in the United States shall issue 5,000-mile tickets, usable and good upon every other railroad in the United States, when the rate established by the commission as a fair and reasonable rate for travel is substantially 1 cent per mile higher than that mentioned in the bill before us, is beyond our power. It is not only unfair and unjust, but it is not within our constitutional authority to enact.

"Every man who knows anything about the subject knows that there is not the difference of 1 cent or 1 1/3 cents per mile in the cost of the service, comparing mileage tickets and specific tickets. There may be some difference; I am not prepared to say what it is. I am not well enough informed to say what it is, any more than I am well enough informed to say what should be the rate upon a carload of apples from Arkansas to Chicago or New York. Whenever the Congress of the United States enters upon the field of determining at what rate either commodities or persons shall be carried throughout the United States, it will not only enter a field of chaos and confusion but it will inflict infinite injury not on the railroads alone but upon the commerce of the country as well."

And again, on pages 1579 and 1580:

"It would not require so many agents to sell these tickets as would be required if the

tickets were sold for each 10 miles or each 100 miles. That is simply an illustration. In so far as the use of transportation in that form reduces the cost of the service, I believe that it is constitutional and would be within the authority of the commission, if we adopt the amendment I have offered, to reduce the mileage rate of these mileage tickets or books to that extent; but when it comes to the further question of allowing a commercial traveler, simply because he is a commercial traveler, to travel at less than I have to pay when I travel, I rebel."

And on January 19, 1922, in the course of a further discussion of the bill, Senator Cummins, at page 1586, said:

"I propose to give the Interstate Commerce Commission authority to compel railroad companies to issue mileage books good for not more than 5,000 nor less than 1,000 miles at a just and reasonable rate. That is all. I can conceive of reasons which would justify some difference between the general rate and the mileage-book rate, because there is, I can easily see, some lessened cost of service when one buys 2,000 or 5,000 miles of transportation as against a man who buys 20 or 25 miles of transportation. But I do not pretend to know what that difference would be, if any. It must be supported by such evidence as will show that it is not a discrimination against the man who uses the ordinary ticket.

"I am sorry the Senator from Wisconsin

did not quite gather the full import of my amendment. That is the very point I want to avoid. I want the discrimination, if there shall be one, based upon sound, economic reason, and there are some reasons that might influence the commission to issue a mileage book at a slightly less rate than the price of the ordinary ticket."

At pages 1584 to 1588 Senator Cummins commented at length upon a letter addressed to him by the Interstate Commerce Commission in reply to his request for the Commission's opinion on Senate Bill No. 848. The Commission's letter is printed in full at pages 1587 and 1588. We quote portions of it:

"INTERSTATE COMMERCE COMMISSION,
Washington, January 11, 1922.

HON. ALBERT B. CUMMINS,
United States Senate, Washington, D.C.

My dear Senator: The commission has considered Senate bill No. 848, sent to Chairman McChord with your letter of January 3, and referred the matter to its legislative committee for reply. In response to your request this committee submits the following information: . . .

. . . Assuming that the transportation service performed is substantially the same as that furnished for the standard passenger fare, it would seem that the only basis for a distinction in price is the quantity of transportation purchased. If sound, this would, of course, warrant lower rates for large shippers than for their smaller competitors.

The commission has, from the time it was created, opposed any rates based on what may be called the 'wholesale' theory. In re Mileage Books (28 I.C.C., 318, 323), we called attention to the fact that if it were not for the authorization in section 22 of the act, 'it is debatable whether the concession from the regular fare made to the purchasers of mileage books would be lawful.'

It may be appropriate to mention the fact that, while 'mileage, excursion, or commutation passenger tickets' are grouped together in section 22, excursion and commutation fares are ordinarily used in a service which is distinct in many particulars from the regular passenger service.

. . . . . .

It may be proper to remark that in the past bills somewhat similar to this one have been referred to us for our views, and we have expressed our disapproval of them, not only on the grounds indicated but on account of the inadvisability, as it seems to us, of fixing rates or fares by statute.

It has seemed to us that when reductions in fares were warranted they should be made in such a way that all travelers could benefit by them. . . .

. . . . . .

The bill, in effect, creates a privileged or favored class into which no one may enter who has not $125 available for the purpose. Whatever reduction in cost of travel is thus effected would inure, not to

those of small means, who need it most, but to those with abundant moneys in hand, who need it least. . . .

The bill does not declare the existing base fares to be unreasonable. It amends an act under which we have found them reasonable. But, without any finding of that reasonableness which the act enjoins upon all rail carriers, it proposes to require them all to establish and maintain a much lower rate per mile for those who can afford to lay out $125 in order to secure it. . . .

The bill disregards the fact that the President, through the director general, determined that a base rate lower than 3 cents per mile was too low and that the commission has since authorized 20 per cent increase in that base rate.

It further raises the question whether any rail carrier subject to the act could justify any base higher than 2.5 cents per mile for any passenger after this bill should become law.

. . . . . .

The ticket may be issued and all the money collected by a carrier which does not participate in the transportation and is financially irresponsible.

These are some of the obvious defects of the bill.

In conclusion your attention is invited to Lake Shore, etc., Railway Co. v. Smith (173 U.S. 684), where the Supreme Court held that it was unconstitutional for the State of Michigan, after prescribing certain maxi-

mum fares, to require the sale of mileage tickets at a considerably lower rate per mile.

Very truly, yours,
JOHN J. ESCH.
(For Legislative Committee)
Commissioner."

On January 20, 1922, dealing with a slightly different phase of the situation, that is, as to the possibility of a reduction in passenger rates resulting in an increase in net income to the railroads from passenger service, Senator Cummins, at page 1631 of the Congressional Record, said:

"The position which I attempted to announce yesterday was this: I am not qualified to express an opinion upon the point just stated by the Senator from South Carolina. There are 11 men who constitute the Interstate Commerce Commission. They have given the subject constant study with all the aids which can possibly be summoned to enlighten their judgment. They think, obviously, that a decrease in the passenger rates would not increase the net income of the railroads from passenger service.

"I would rather accept their judgment upon that question than to rely upon my own; and, if the Senator will accept it in the spirit in which I state it, I would rather rely upon their judgment on that point than upon the judgment of the Senator from South Carolina or any other Senator or any other Member of Congress.

"It is for that reason, and that reason

alone, that I am opposing the passage of this bill in its present form. I believe that it is a question which ought to be decided from time to time by the Interstate Commerce Commission and not by Congress. In other words, I think the Interstate Commerce Commission is better qualified than Congress is to say what the rates, both passenger and freight, should be, in order to do justice at once to the people of the country and to the railroads of the country. We have never tried to do it before, and I am hoping that we will not attempt it at this time."

The bill was further discussed in the Senate on January 21st, and passed the Senate on that date in the form appearing on page 1691 of the Congressional Record, which need not be quoted here. It is only necessary to say that the bill, as it passed the Senate, merely directed the Commission to require, after notice and hearing, the carriers to issue joint interchangeable mileage tickets at a just and reasonable rate per mile, the rate, of course, to be determined by the Commission. The bill, as it passed the Senate, went to the House and was referred to the House Committee on Interstate and Foreign Commerce, and extensive hearings were held by that committee, at which those favoring and those opposed to the bill were heard. As appears from page 10,455 of the Congressional Record of June 29, 1922, and as was stated by Represenative Huddleston, a member of the Committee on Interstate and Foreign Commerce, after reference

to the fact that commercial travelers were urging the passage of the mileage-book bill, the bill to meet the demands of the commercial travelers was introduced in the Senate and was there passed after the Senate, to use his language, "had materially changed it and cut the heart of it." Further using his language: "Then the bill came to the House and our Committee on Interstate and Foreign Commerce proceeded to emasculate it and remove its vital organs." Going on to discuss the bill, he says (p. 10,455):

> "Excuse me for a moment. This bill was intended by the commercial travelers to secure for themselves and for others who may desire to do a good deal of traveling and who have the money to put up a definite reduction in fares. They intend it to secure such reduction by means of a universal interchangeable mileage book.
>
> "I suppose the committee thought the commercial travelers were easy to fool, for they amended the bill by inserting the language 'or scrip coupon tickets' after the mileage-book phrase. This was a complete change in the purpose of the bill, for a scrip coupon ticket is as much like a mileage book as a Kentucky saddle horse is like a spotted bull. They have no relation to each other. The mileage book is composed of units each of which is good for a mile travel. A scrip coupon ticket is composed of units to be used in place of money to purchase tickets.
>
> "Note, now, that there is no requirement that this coupon ticket shall be sold at a discount. The requirement is merely that

it shall be issued 'at a just and reasonable price.' This language would lead uninformed people to think that it was intended to sell the coupon ticket at a discount; that a just and reasonable price for a coupon book would be less than the regular price for a ticket. But the fact is, and members of the committee know it—whether they will tell you so or not it is true, and I challenge them to deny it—that the only evidence offered before our committee showed that these coupon tickets produced no economy or saving to the railroads and can not be sold at any discount.

"Therefore, if the Interstate Commerce Commission does exactly what this Bill instructs them to do they will issue the coupon tickets at an increased price over the regular tickets. Instead of the commercial travelers being able to buy a coupon ticket at a discount, they will have to give a premium, because such tickets work certain losses to the railroads and they can not afford to put them out at the same price. This was all the evidence before the committee. Now, let any member of the committee deny that if he dares.

"They asked for bread and we have given a stone. We have brought forth a Bill pretending we are going to give the commercial travelers lower fares, and yet if they go ahead and buy a coupon ticket instead of traveling at regular fare they will have to pay a premium."

And then, in explaining what this course of action will be, on the same page, he said:

> "I am in a funny quandary. If this Bill meant what its sponsors want it to mean and what the committee are pretending that it means—that is, that purchasers of mileage books and coupon tickets shall ride the trains at the expense of the general public—of course I could not vote for it. On the other hand, if it means that all such persons are to pay their own way, which, if the evidence before the committee is to be believed, will be as much or more than the general public will pay, there can be no objection to passing the Bill. The thing that sticks me is I do not like to be a party to perpetrating a fraud on the commercial travelers or anybody else."

On page 10,457 Representative Winslow, Chairman of the Committee on Interstate and Foreign Commerce, who was in charge of the bill in the House, used this language:

> "The Bill which came to us from the Senate was merely a Bill to direct the Interstate Commerce Commission, after a careful inquiry, after notice and hearing, to require each rail carrier coming under the Interstate Commerce Act to issue mileage books under such regulations and conditions as the commission might see fit to establish. That is all there was to the Bill.
>
> "The Senate never intended to express any opinion on the mile price of mileage or on what might have been the original base

cost of mileage or to do anything other than to give direction to the Interstate Commerce Commission to issue mileage books under regulations, and so forth. That is all any proponent of the Bill asked the Senate to do."

Responding to the charge by Representative Huddleston of Alabama that the bill in question was a pretense of doing something and yet doing nothing, another member of the House Committee on Interstate and Foreign Commerce, Mr. Hawes, at page 10,459 of the Congressional Record, in pointing out that the commercial travelers and others favoring the bill clearly understood its nature and effect, made the following statement:

"Mr. Chairman and gentlemen of the House, as a member of the committee that studied this Bill and recommends its passage I would not have the impression go out, as indicated by the gentleman from Alabama, that the proponents of this measure do not understand the Bill and every portion of it.

"I asked the counsel for the Travelers' Association, composed of 600,000 men, whether they understood this Bill to mean that rates would be lowered or if, on the contrary, whether the Interstate Commerce Commission could not, if it desired, actually raise the rates. He said that was his understanding. So this Bill does but one thing—it provides a forum for the traveling men of the United States where they can be heard in asking for an interchangeable mile-

age book or interchangeable scrip tickets. This Bill provides a place of hearing. If the national rate-making body desires to lower the rate it is for them to say upon full hearing and investigation. They may actually, if they so desire, raise the rates. So the traveling men of America, if the House passes this Bill, are not being deceived. They understand exactly what the Bill provides for. It is true that the original Bill introduced in the Senate had a fixed rate per mile, but in the argument before the committee in the Senate and upon the floor of the Senate the proponents of this Bill discovered that could not be done; that Congress could not fix rates for railroads. So when the Bill came to the House before our committee, they had abandoned that position. They understand this Bill thoroughly; they want it passed; there is no misunderstanding about it, and all it does is to provide a forum, a place of hearing, for the traveling men of America."

When the House Committee amendments were under discussion, Mr. Newton, a member of that Committee, had the following to say regarding the proposed amendment to strike out the word "interstate":

> "When the bill came from the Senate the mileage book so issued would be 'good for interstate passenger carriage' only. This would be of little benefit to the commercial travelers.
>
> "Of the great bulk of commercial travelers

most of their trips are from town to town, which would be an intrastate carriage. The mileage book would not be valid for such carriage. . . . Hence the committee amendment to strike out 'interstate' " (Congressional Record, vol. 62, p. 10,460).

When the bill as passed by the House was under discussion in the Senate, Senator Pomerene spoke as follows regarding the House amendment striking out the word "interstate":

"Another objection to the bill as it then was was this: It would have required the railroads to accept these coupons or tickets not only in interstate passenger traffic but in intrastate passenger traffic as well, and, as it was then drawn, on all roads. After a very careful examination of the subject and very serious discussion, particularly by the lawyers of the committee, we felt that the legislation should be limited to interstate passenger traffic, the words 'interstate traffic' to be defined as the courts have heretofore defined them.

"Of course, all recognize that under the decisions of the courts there may be and is such a relation between intrastate traffic and interstate traffic that they are interdependent upon each other when it comes to the determination of what shall be proper rates and rates which are not confiscatory. For that reason we inserted the word 'interstate' before the words 'passenger carriage,' so as to make the legislation apply to interstate traffic. It developed at that time—at least, according to the estimate of one gen-

tleman who was here advocating this measure—that about 60 per cent of the passenger traffic was intrastate and about 40 per cent was interstate. The Senate of the United States passed this bill limiting its provisions to interstate traffic because those who were familiar with the subject felt that the Senate ought to pass a bill which was constitutional in the judgment of the Senate. The bill as it was messaged to the House of Representatives read:

" 'A just and reasonable rate per mile good for interstate passenger carriage upon the passenger trains'—

"And so forth. The House of Representatives struck out the word 'interstate'.

"What construction would ordinarily be given by anyone who was investigating the history of this legislation to that action on the part of the House? The very fact that the House struck out the word 'interstate' would indicate that that body did not want to limit the use of these mileage tickets to interstate traffic, but desired to have those books usable on both kinds of traffic, intrastate as well as interstate. If those who appeared before the members of the committee and discussed this question are right in their belief that 60 per cent of the passenger traffic is intrastate, it is going to raise a question of very great importance both to the railroads and to the passengers.

. . .

". . . The effect, in my judgment, of this bill is going to be that the traveling public will be led to believe that mileage books

made interchangeable shall apply to intrastate traffic as well as interstate traffic. I do not believe that can be done.

"It may be that the Interstate Commerce Commission will accept this bill and issue an order making it applicable to intrastate business as well as to interstate business; it may be that the railroads will accept such an order; but I do not believe they will, or at least some of them will not.

"That is the situation, and it seems to me that it would have been in the interest of certainty if the House had concurred in the Senate bill as it was passed. I believe that there is a certain amount of convenience to be attached to the use of interchangeable mileage books, and I should like to see the traveling public have the benefit of them; but I do not want to be put in the position where it may be said of the Congress, 'They gave us something here; we had reason to believe that it was a constitutional law; we had reason to believe that interchangeable mileage books would be accepted in intrastate travel; and we find now that we have been deceived.' My judgment is that striking out the word 'interstate' renders the bill unconstitutional; and while I am not going to object to its consideration and its passage, if other Senators want to take the responsibility, as I see the legal question involved, I can not, under my oath as I conceive it to be, vote for this bill. Accordingly I am going to vote against it" (Congressional Record, vol. 62, pp. 10,647, 10,648).

APPENDIX C.

INTERSTATE COMMERCE COMMISSION DECISIONS CITED IN NOTE 4, PAGE 324, OF THE OPINION IN NASHVILLE, C. & ST. L. R. v. TENNESSEE, 262 U.S. 318:

Sprigg v. *B. & O. R. Co.*, 8 I.C. Rep. 443 (1900):

Defendants withdrew the 180-trip quarterly ticket between Baltimore and Washington. This ticket had been in use for about fifteen years.

Complainants were users of the 180-trip tickets.

The Commission found that—

Commutation rates produce discrimination against places which do not get them, but that does not necessarily constitute *unjust* discrimination. It is sanctioned by section 22.

The carriers are to be condemned for withdrawing a privilege so long granted by them "as to have the appearance and hold out the inducements of a permanent policy." But they *had the legal right to withdraw it.*

The complainants demand a special rate, which admittedly would be unremunerative if applied to the entire volume of traffic. They do not attack present rates or relations as unreasonable.

The Commission, speaking by its chairman, said (pp. 451-456, *passim*):

> "The Commissioner has no power to impose such a requirement. It would be beyond our jurisdiction to make the order asked for in this proceeding, even if satisfied of the justice and equity of complainants' demands. The theory and purpose of the law are opposed to privileges not enjoyed

by all persons alike, and we have no authority to attempt the enforcement of special agreements for the benefit of a particular class. Under the provision of the 22d section above quoted, carriers are allowed to issue mileage, excursion and commutation tickets, but ordinarily they cannot be compelled to do so. The permission does not create an obligation. To the extent necessary for their use, tickets of the description named are exempt from the general rules of the statute. Compliance with those rules may be directed by us, but requiring exceptions thereto is not within our province; and this applies as well to the restoration of such tickets where they have been withdrawn as to the refusal to furnish them where their introduction has been requested. It may be that the allowance of commutation rates at stations on one line of a railway system, and the denial of such rates at stations on another line of the same system, such stations respectively being *of similar character* and at similar distances from a common terminus, would be an undue preference within our power to correct; but that question is not before us. Upon the facts presented we have no authority to grant relief. . . .

"In whatever aspect the question is considered the argument for complainants comes to this, that carriers can be compelled, under such circumstances as are disclosed in this case, to put in discriminating rates, provided they are not unduly discriminating.

Because they are permitted to sell commutation tickets, therefore they can be forced to do so. At least, if they have sold such tickets for a considerable period they can be required to continue to sell them, although at a rate much below the sum justly charged to the general public. There is no legal basis for such a contention. If we had full rate-making power, as ample and complete as that possessed by the Congress itself, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay, and in determining what that rate should be we could take into account the price at which commutation tickets had been sold, the length of time they were furnished, and all other facts bearing upon the reasonableness of a common public rate for the territory and travel in question; but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class.

"This conclusion is fully supported by the case of *Lake Shore & M. S. R. Co.* v. *Smith* . . . (discussion and quotation therefrom).

"A careful study of this opinion convinces us that the principle announced by the Supreme Court is of decisive application to the case in hand. Manifestly, the power of the Commission cannot be greater than the power of Congress or a State legislature to control or prescribe the rates of railroad carriers. And if the courts would not uphold an act of legislation which re-

quired these defendants to grant special rates to complainants and others in like situation, it is plain that an order of the Commission directing them to do so would be equally invalid for want of authority to make it.

"*The Party Rate Case* (*Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, 4 I.C.R. 92) presents no different view and permits no different inference. It simply affirmed the right of the defendant in that case to sell party-rate tickets if it chose to do so. So far from holding that a carrier can be compelled to furnish such tickets, everything said in the opinion is to the contrary import. The difference between voluntary action and legal compulsion is illustrated by both decisions. Yet if the principle contended for by complainants is sound, why would it not lead to requiring the sale of party-rate tickets,—especially by a carrier which had previously sold them?

"As respects the question of power, we are unable to see any distinction between ordering the granting of a special rate not before furnished, and ordering the restoration of such a rate which has been withdrawn after being allowed for a given period. If the offering of commutation tickets originally rests in the discretion of the carrier, the discontinuance of such tickets must be equally within its discretion. What provision of the Act can be invoked to require a carrier to keep on making special

rates which it has voluntarily established, when it cannot be compelled to put in such rates in the first instance? The rates actually charged when complaint is made or investigation had are the rates to be passed upon by the Commission. If lower rates have been previously accorded, whether for a longer or shorter time, that fact is pertinent and entitled to full consideration, but the question to be decided in every case is whether under all the circumstances the existing rates available to the general public are just and reasonable. If they are, there is no power to compel exceptional and lower rates for a special class of passengers.

"It does not by any means follow that carriers can withdraw the various commutation privileges they have been accustomed to grant, and *lawfully* charge all persons the rates at which single one-way tickets have been sold . . . If these defendants should discontinue all their commutation, excursion and round-trip tickets, . . . even then the question would be, as respects our power under the present law or under any law, What rates under those circumstances, and in view of the far lower rates so long accorded, would be just and reasonable for everyone to pay? We could not go further, and require another and lower rate for the benefit of any class in any locality. There can be no legal obligation on the part of the carrier to observe a rate which is just to the general public, and also to provide a special and more favorable rate

for some portion of the public. The commutation rate is necessarily a preferential rate. It is one thing to say that it may be allowed without subjecting the carrier to the charge of undue preference; it is quite another thing to say that it must be granted provided it is not unduly preferential."

(Clements, Commissioner, dissents on the question of the carriers' right to *withdraw* rates—not on the question of the Commission's right to compel their establishment—see p. 479.)

Field v. *So. Ry. Co.*, 13 I.C. Rep. 298 (1908):

Petition that Commission compel re-establishment of special party rates which in past years had generally been accorded to theatrical companies and special organizations engaged in giving public exhibitions.

The Commission, speaking by Commissioner Harlan, said (pp. 298-299):

"It is clear that the Commission has no authority to enter such an order. While the act to regulate commerce as amended confers upon the Commission the power to reduce a passenger fare alleged to be excessive, when a complaint to that effect has been filed and the issue thus made has been supported by competent testimony, it has vested in the Commission no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions or for special

purpose. This was so held in Cator v. So. Pac. Co. 6 I.C.C. Rep. 113, and in Sprigg v. B. & O. R.R. Co., 8 I.C.C. Rep. 443, and the question is not to be regarded therefore as open to further discussion. On that ground alone this petition should be dismissed."

Metropolitan Paving Brick Co. v. *Ann Arbor R.R. Co.*, 17 I.C. Rep. 197 (1909):

The Commission found, in complaints against the reasonableness of rates on paving brick, that "there is no transportation reason for making different rates on different grades of fire, building, and paving brick" (p. 205).

At page 204 Chairman Knapp, speaking for the Commission, disposed of one of complainants' contentions as follows:

". . . the paving interests suggest a classification limited to paving brick and block for the immediate use of United States, state or municipal governments. So far as the use of paving blocks or brick for the use of the United States, state, or municipal governments is concerned, reference is made to section 22 of the act to regulate commerce which gives the carriers the right to transport traffic for the above-named authorities at reduced rates if they see fit to do so. This can be done notwithstanding the conclusion reached in this case. What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to

transport traffic for the United States, state, or municipal governments at reduced rates."

Eschner v. *P. R.R. Co.*, 18 I.C. Rep. 60 (1910):

Complaint that defendants' tariffs are unreasonable and discriminatory in that they prohibit the use of exchange orders in connection with Central Passenger Association interchangeable mileage books as warrants for checking baggage through or securing through sleeping accommodations between points west of Pittsburg and points east thereof, or *vice versa*.

Commissioner Harlan, speaking for the Commission, said (at pp. 63-64), after quoting from section 22 of the Interstate Commerce Act:

"This language, as will be observed, is altogether permissive and has never been understood as giving the Commission authority to require interstate carriers to sell interstate transportation in that form [mileage, excursion, or commutation tickets]. In *Field* v. *So. Ry. Co.*, 13 I.C.C. Rep. 298, when that clause was under consideration, we said: [Here follows a quotation from p. 299 of that case.]

"If mileage, excursion, or commutation tickets are voluntarily put on sale by carriers, under tariff authority, that clause in the act means that they are to be exempted from a condemnation that other provisions of the act might require. We think it clear, therefore, that a carrier may not only withhold such special fares from its patrons by omitting to provide for them in its tariffs, but may at its pleasure, at least so long

as no undue discrimination or other violation of the act is involved, attach conditions and restrictions to the use of such special fares. . . . If a carrier may extend or withhold the privilege of mileage, excursion, and commutation tickets, it would seem to follow that it may attach to them, as an integral part of the contract, conditions of the kind involved in this proceeding; and since we can not compel carriers to issue such tickets, we see no grounds upon which we may compel them to modify the conditions which they attach to them, so long, at least, as these conditions result, as heretofore stated, in no discrimination nor in the violation of any other provision of the act."

Dairymen's Supply Co. v. *P. R.R. Co.,* 28 I.C. Rep. 406 (1913):

Complaint alleging undue prejudice and disadvantage because defendants return free of charge property from certain state fairs, but not from the National Dairy Show (or other industrial or trade exhibitions).

The Commission dismissed the complaint, saying, at page 408:

"Section 22 of the act provides:

" 'That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates . . . to or from fairs and expositions for exposition thereat.'

"But, while the act authorizes the free transportation of property for the purposes named, it does not require the carriers to

grant such transportation. It follows that the carriers may grant such transportation or deny it, as they deem best, provided their practices in that respect do not result in unjust discrimination under section 2 or undue preference or prejudice under section 3 of the act.

"Upon the facts of record we are of the opinion that the practice does not result in undue prejudice or disadvantage to this complainant."

United States v. *U.P. R.R. Co.*, 28 I.C. Rep. 518 (1913):

Complaints by the government sought to compel the establishment of certain through routes and joint rates under section 15 of the Interstate Commerce Act.

The Commission, speaking by Chairman Clark, dismissed the complaints. At page 524 one of the government's contentions is disposed of in the following language:

"In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and without tariff authorization, but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the general public. . . .

"We hold that no preferred parties or special interests, even though pertaining

> to the extraordinary functions of government, are entitled to special consideration in the administration of those portions of section 15 of the act here involved, and that the record does not otherwise justify the granting of petitioner's prayers. An order will be entered dismissing the complaints."

Havens & Co. v. *C. & N.W. Ry. Co.*, 20 I.C. Rep. 156 (1911):

Complainant shipped coal for government use in January, 1909. At that time there was no land-grant rate applicable, but one was subsequently published (May, 1909).

Held, complainant was not entitled to the benefit of the reduced rate.

The question turned upon rulings of the Commission, and it was found that under rulings then in force the complainant would have been entitled to the reduced rate if it had been published, but that it was not published till after the making of the shipments in question.

At page 157 the Commission said:

> "In February, 1908, the Commission announced the following rulings:
>
> "'*33. Reduced transportation for Federal, state, and municipal governments.*— Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission.'

"'*36. Rates on shipments for the Federal Government.*—If title to property, such as postal cards, passes to the Government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the Government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the Government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the Government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise.'

"In April, 1908, rule 36, above quoted, was superseded by rule 65, reading as follows:

"'*65. Special rates for United States, state, or municipal governments.*—Section 22 of the act authorizes the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments. As has before been decided, such transportation can be granted without the publishing and filing of tariff therefor only in instances where the arrangement is directly between such government and the carrier; but it is considered permissible for carriers to incorporate in their lawful tariffs special rates for the United States, state, or municipal governments applicable only to traffic consigned to such United States, state, or municipal government by name, in care of a recognized officer thereof.'

"In December, 1909, the rule last quoted was rescinded and rule 36 restored in lieu thereof. . . .

"Rule 65 was adopted with the idea that publication of special rates upon traffic consigned to the Government would reduce the price of various materials purchased by it for delivery at designated points by approximately the difference between the regular rate and the lower rate which carriers were willing to accept on Government business. But further consideration of the rule itself, as well as of certain transactions which were possible thereunder, convinced the Commission that restoration of its original rule was necessary to prohibit discriminations which, if not unlawful, were at least contrary to the spirit of the statute. Having reached the conclusion that it is improper to permit the benefit of special rates on Government material to accrue to anyone other than the Government itself, the petition herein must be denied and the complaint will therefore be dismissed."

Cator v. *S.P. Co. & U.P. Ry. Co.*, 6 I.C. Rep. 113 (1893):

The Commission said (pp. 117-120):

"Section 22 of the Act to regulate commerce as amended provides: 'That nothing in this Act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets.' To rule in this case that complainant and his associates were subjected to unjust discrimination or undue

prejudice by the issuance of excursion tickets in June and the refusal to issue such tickets for a similar occasion [a political convention] in July, would be a notice to carriers that if they do issue excursion tickets for a given purpose, they lay themselves under obligation to issue them for a similar purpose whenever occasion offers or application is made. Congress intended by the provision in the 22d section to leave the issuance of these tickets free from such restriction. . . .

"The fact remains, however, that as the law stands it gives the Commission no authority to order a carrier to cease and desist from discriminating between bodies of persons traveling at different times for a similar object by establishing a special excursion rate for one occasion and refusing to make any reduction whatever for the other. Whether the law should be amended in this respect is a question for Congress to consider.

"While we are satisfied that there is no authority under the law for an order from the Commission, yet we feel compelled to express our belief that the importance of national conventions for the nomination of candidates for President and Vice President of the United States . . . all point to the conclusion that a proper observance of the spirit of the law to regulate commerce . . . would grant excursion rates to each national convention for such purposes."

Commutation Rate Case, 21 I.C. Rep. 428 (1911):

Complaints by commuters and railroad commissioners that certain newly increased commutation fares of several carriers were unjust and unreasonable.

Held, that some new fares are excessive and unlawful, others not. Commutation traffic stands by itself as a special and distinct kind of service for which a carrier may demand no more than a reasonable compensation.

Speaking through Commissioner Harlan, the Commission said, at pages 437 and 443:

> "Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission and is the view generally entertained, although there may be exceptional circumstances where a different conclusion would

be required. It by no means follows, however, that a carrier under section 22 may exercise the same scope and freedom of action with respect to commutation tickets. A carrier that has not undertaken a commutation service may possibly not be compelled to do so under the present law; that question is not before us and is not therefore considered. But having undertaken such a service may it discontinue it at discretion, or, desiring to continue it, may it do so free of control by the Commission with respect to the reasonableness of the compensation that it demands of the commuting public? [Here follows a discussion of the origin and history of commutation traffic and its distinction from other sorts of passenger traffic—pp. 438 to 443.] . . .

". . . we see no reason why the reasonableness of the fares demanded for the service may not be looked into by the Commission under section 1. It is conceded on behalf of the principal complainant that a carrier may not be compelled, under the present law, to undertake a commutation service and to establish commutation rates. That is probably true. But having undertaken a definite and regular commutation service, such as is shown of record on the part of each of the defendants in this proceeding, the power as well as the duty of the Commission under section 1 to examine into the reasonableness of the charges exacted, when complaint has been made, seems to be beyond question. Reading section 22 in the light of the special nature and character of

> commutation traffic and service, the utmost that reasonably may be said of it, as applied to commutation tickets, is that it constitutes a statutory recognition of the fact that commutation is a different kind of traffic and therefore is not to be compared with any other kind of passenger traffic."

United States v. *A. & V. Ry. Co.*, 40 I.C. Rep. 405 (1916):

Complaints by Post Office Department that rates on post cards, stamped envelopes, etc., were unjust and unreasonable. Complainant asked the Commission to establish rates equivalent to third- or fifth-class freight rates.

Prior to 1912 the rates on these articles were arranged between the individual carriers and the government. They ranged from fourth to first class. Since then the defendants had charged substantially first-class rates without land-grant deductions.

No rates were published on these articles by any of the defendants, and only the southern carriers provided a rating for them.

The Commission said (p. 406):

> "Defendants challenged our power to require the establishment of ratings, on the ground that they are not 'common carriers' of government stamped articles, but are essentially private carriers under special contracts. They have been and are, however, ready and willing to transport these articles for the government at rates satisfactory to them, and we are not asked to prescribe ratings for the benefit of the general public.

Under the circumstances we think we have authority to prescribe reasonable ratings for the traffic in question, although, under section 22 of the act, the carrier and the government may agree upon some other rate. Conference Ruling 26. The tariff rate or classification rating is the maximum which the carriers may demand from the government. Conference Ruling 218."

And at page 407:

"Southern classification provides for the acceptance of postal cards, envelopes, and newspaper wrappers, stamped, at first-class rates when shipped for the account of the government on government bills of lading, in cars protected by government locks and seals, minimum weight 30,000 pounds. Defendants are willing to accept the same articles for the government at first-class rates, in substance and effect conforming to the provisions of the southern classification rating. We find that the southern classification rating is just and reasonable, and for the future will be a reasonable maximum rating in official and western classification territories also."

APPENDIX D.

CONFERENCE RULINGS OF THE COMMISSION DEALING WITH SECTION 22 ARE THE FOLLOWING (SEE CONFERENCE RULINGS ISSUED NOVEMBER 1, 1917):

"33. *Reduced rate transportation for federal, state, and municipal governments.*—Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 208e, 218, 244, 311, and 452.)"

"36. *Rates on shipments for the federal government.*—If title to property, such as postal cards, passes to the government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see ruling 452; also *United States* v. *A. & V. Ry. Co.*, 40 I.C.C., 406.)"

"65. *Special rates for United States, state, or municipal governments.*—(Overruled and withdrawn by ruling 244; also see ruling 208*e*.)"

"107. *Reduced fares for the deportation of Chinese not permissible.*—Special fares can not lawfully be accorded by carriers for the transportation of Chinese to the ports for deportation, even though the expense is paid by the government.

"Provisions for the subsistence and care in transit of Chinese being deported are matters of contract between the carrier and the government, and need not be published in the tariffs."

"208. *Free passes and free transportation.*—(*e*) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words "reduced rates" are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable

mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting, and observing tariffs must be complied with. (See rulings 33, 36, 65, 218, 244, 297, and 311; compare ruling 107.)"

"218. *Transportation of federal troops.*— The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States government, and that the rates or fares so made need not be posted or filed with the Commission. (See rulings 33 and 208e.)

"The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be regarded, however, as the maximum rates and fares that may lawfully be charged the government for the movement of federal troops. (See United States v. A. & V. Ry. Co., 40 I.C.C., 406.)

"This ruling also governs similar transportation for the naval and marine services. (Ruling does not apply to state or territorial troops; see ruling 297.)"

"244. *Reduced rates on property for the United States or municipal governments.*— Rule 61 of Tariff Circular 17-A and Conference Ruling 65 are hereby withdrawn and the previous ruling of February 4, 1908, reported as Conference Ruling 36, is restored. (See rulings 208e and 311.)"

"297. *Free and reduced rate transportation of persons traveling at the expense of state or territorial governments.*—Conference Ruling 218 is confined to movements at the instance and expense of the United States. The Commission finds nothing in the law authorizing free or reduced rate transportation of persons, other than indigents, traveling at the expense of a state or territorial government. (See rulings 208e and 452.)"

"311. *Free transportation of property for county authorities.*—(Restated in ruling 452.)"

"452. *Free transportation of property for townships and counties.* — Upon inquiry: *Held*, That townships and counties are municipalities within the meaning of section 22 of the act to regulate commerce and carriers may lawfully transport their property free or at reduced rates. (See rulings 33, 36, 244, and 297.)"

Note: Conference Rulings 65 and 311 originally read as follows:

"65. *Special rates for United States, state, or municipal governments.*—Section 22 of the act authorizes the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments. As has before been decided, such transportation can be granted without the publishing and filing of a tariff therefor only in instances where the arrangement is directly between such government and the

carrier; but it is considered permissible for carriers to incorporate in their lawful tariffs special rates for the United States, State or municipal governments applicable only to traffic consigned to such United States, State, or municipal governments by name in case of a recognized officer thereof. (Overruled and withdrawn by the Commission. See Ruling 244; see also Rulings 36 and 311.)"

[See *Havens* v. *C. & N.W. Ry. Co.*, 20 I.C.C. 156, 158.]

"311. *Free transportation of property for county authorities.*—Upon inquiry, *Held* That under section 22 interstate lines may carry free or at reduced rates for county authorities. (See Rulings 33, 65, 208e, 244, & 297.)"

The Conference Ruling Bulletin of November 1, 1917, contains an explanatory note reading in part as follows:

"The rulings of the Commission in conference are announced informally from time to time through the public press and are later edited and issued in this form for the information of shippers, carriers, and others interested in transportation matters. The rulings express the views of the Commission on informal inquiries involving special facts or requiring an interpretation and construction of the law, and are to be regarded as precedents governing similar cases."

APPENDIX E.

THE ACT TO REGULATE COMMERCE, SECTIONS 1 (4), 1 (5), 1 (7), 2, 3 (1), 3 (3), 6 (7), 8, 10 (1), 13 (1), 13 (2), 15 (1), 15*a* (2), 15*a* (3), 22 (1), 22 (2), 22 (3):

SEC. 1. (4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided,* That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged

for the different classes of messages: *And provided further,* That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

. . . . . .

(7) No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested,

persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two

thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any

particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

SEC. 6. (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 10. (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United

States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

SEC. 13. (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified,

or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Com-

mission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may

be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15*a* (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning

March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

SEC. 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;

and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mile-

age tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

(2) Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

(3) Any carrier which, through the act of any agent or employee, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and

regulations lawfully made and published by the commission hereunder, or any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed $1,000.

APPENDIX F.

INDEX TO RECORD BEFORE INTERSTATE COMMERCE COMMISSION.

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*Exhibit 50 was prepared and submitted by the Commission itself—not the carriers (Rec. p 160).

Subject	References are to pages of the Record. Carriers' Evidence	Other Evidence
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THE INTERCHANGEABLE MILEAGE TICKET CASE.

No. 469

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE BRIEF AND MAKE ORAL ARGUMENT ON BEHALF OF THE INTERNATIONAL FEDERATION OF COMMERCIAL TRAVELERS ORGANIZATIONS, AS *AMICUS CURIAE.*

CLIFFORD THORNE,
JAMES W. GOOD,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO.

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To the Honorable Judges of the Supreme Court of the United States:

Now comes the International Federation of Commercial Travelers Organizations (hereinafter called the petitioner), a voluntary unincorporated association, and respectfully asks leave as *amicus curiae* to file a brief, and through its solicitors to make an oral argument herein opposed to the positions taken by appellees, and in support of the positions taken by the appellants relative to the construction and application of provisions of the Interstate Commerce Act, especially Section 22 thereof;

also in opposition to certain positions taken by appellees upon the construction and application of the Fifth and Fourteenth Amendments to the Constitution of the United States. This motion is made under the provisions of: the Interstate Commerce Act; the Act of October 22, 1913, entitled: "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913, and for Other Purposes;" also the provisions of the federal statutes applicable thereto and governing the general equity jurisdiction of this court.

Appellees seek to have affirmed the finding of the District Court of the United States for the District of Massachusetts, in Equity No. 1808, dated April 23, 1923, enjoining and restraining the enforcement of an order of the Interstate Commerce Commission relative to the establishment of non-transferable interchangeable scrip coupon tickets in a proceeding entitled, "Interchangeable Mileage Ticket Investigation," Docket No. 14104.

Parties submitting this application were and are interested in the controversy before the Interstate Commerce Commission to which the aforesaid order refers, which is the subject-matter of this suit, and were and are deeply interested in the pending case involving the validity of the order made by the said Commission in said proceeding, all of which is more particularly set forth in the statement attached hereto.

CLIFFORD THORNE,
JAMES W. GOOD,
Solicitors for the International Federation of Commercial Travelers Organizations.

In support of this motion, your petitioner respectfully alleges that it represents large interests profoundly concerned in the subject-matter of this proceeding.

Your petitioner, the International Federation of Commercial Travelers Organizations, has its general offices in the City of Chicago, County of Cook, State of Illinois, and is composed of fourteen (14) members, consisting of associations having an aggregate membership of more than 700,000 traveling men throughout all portions of the United States, said associations with their membership as of December 31, 1922, being as follows:

Western Travelers Accident Association (general office, Omaha, Nebraska)	7,900
Iowa State Traveling Men's Association (general office, Des Moines, Iowa)	67,400
Travelers' Protective Association (general office, St. Louis, Mo.)	102,000
Illinois Commercial Men's Association (general office, Chicago, Ill.)	165,000
Commercial Travelers Mutual Accident Association (general office, Utica, N. Y.)	170,000
Indiana Travelers Accident Association (general office, Indianapolis, Ind.)	5,700
United Commercial Travelers of America (general office, Columbus, Ohio)	105,900
Connecticut Commercial Travelers Mutual Accident Association (general office, New Haven, Conn.)	7,000
Commercial Travelers Eastern Accident Association (general office, Boston, Mass.)	9,900
Minnesota Commercial Men's Association (general office, Minneapolis, Minn.)	17,400

Illinois Traveling Men's Health Association (general office, Chicago, Ill.)..... 59,300

Commercial Travelers' Boston Benefit Association (general offices, Boston, Mass.)..... 5,700

Northwestern Traveling Men's Association, (general office, Chicago, Ill.)..... 500

National Shoe Travelers Association, Boston, Mass. 2,500

All of the above named federated bodies are incorporated under the laws of the states in which their general offices are located.

Your petitioner furtlier alleges that it took a leading part in the hearings before congressional committees relative to the enactment of the legislation under which the order at issue was entered by the Interstate Commerce Commission, the same being an amendment to Section 22 of the Interstate Commerce Act, directing the Interstate Commerce Commission to require the issuance of interchangeable scrip coupon or mileage tickets on railroads, and for other purposes. Your petitioner was represented by its officials in all public hearings before the committees of the Senate and of the House of Representatives of the United States while said measure was pending.

Your petitioner also participated in all hearings before the Interstate Commerce Commission in the proceeding entitled, "Interchangeable Mileage Ticket Investigation," Docket 14104, which resulted in the order made by the Interstate Commerce Commission at issue in this proceeding.

The organization of traveling men which appeared by

counsel in the lower court, having its principal membership within the State of New York, is not associated in any manner with the undersigned. The International Federation of Commercial Travelers Organizations has a membership in every state of the nation, has been in active operation for more than twenty-three (23) years, and is the recognized national body of traveling men of the United States.

It is of vital importance to your petitioner, and to American industry as a whole, that the order of the Interstate Commerce Commission at issue shall be sustained and not overthrown by this court.

Questions of public policy for the welfare of the community have been decided by Congress and by the Commission, and the decision of the lower court is an unwarranted invasion of the province of another branch of the government. In the entire history of the organization of the traveling men of the United States, no more important proceeding affecting them directly has ever been tried before any court or tribunal than the one at bar. Unfortunately we were represented only by our president at the preliminary hearing on the application for a temporary injunction before the lower court. But, by agreement of other parties there represented by counsel, the preliminary hearing for a temporary injunction was transformed into the final hearing on the permanent injunction, thereby depriving the International Federation of Commercial Travelers Organizations from participating in the trial, as it had fully intended and had made preparations to do. We sincerely desire to be heard on these issues of such moment to our activities, and of such concern to the industrial welfare of the whole people.

WHEREFORE, the undersigned respectfully ask leave of this court to file a brief and make an oral argument herein on behalf of the aforesaid petitioner, as *Amicus Curiae.*

Respectfully submitted,

CLIFFORD THORNE,
JAMES W. GOOD,
Solicitors for the International Federation of Commercial Travelers Organizations.

Dated at Chicago, Illinois, this 5th day of September, 1923.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

D. K. CLINK, being duly sworn, deposes and says that he is Secretary-Treasurer of the International Federation of Commercial Travelers Organizations, the applicant described as the petitioner herein; that he has read the foregoing motion and supporting statement, and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

D. K. Clink

Subscribed and sworn to before me by the said D. K. Clink, this 14 day of Sept., A. D. 1923.

(Seal) F. M. Harleman

Notary Public.